IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1117.

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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APPENDIX.

RELEVANT DOCKET ENTRIES.

Cases Nos. 15246, 15563.

Date	Filings-Proceedings
6/17/69	Filed certified copy judgment of Supreme Court affirming in part and reversing in part as to costs, & remanding to this Court for further proceedings in conformity with opinion.
6/17/69	Filed original & 3 copies of motion of appellant Hazeltine Research, Inc. for the scheduling of supplemental briefs & oral argument on the issues remanding undecided in this Court, exhibit & service (15563).
6/23/69	Filed original & 3 copies of appellee's answer to motion for scheduling of supplemental brief, etc., affidavit & service. (15563)
6/23/69	Filed original & 3 copies of appellee's motion to disqualify Judge Cummings from further participation, etc., affidavit & service (15563)
6/25/69	Filed original & 3 copies of appellant's motion to extend time to respond to motion & answer filed by appellee on 6/23/69, affidavit & service. (15563).
6/30/69	Entered order granting issuance of mandate & denying all other motions. (15247-15563-4)

7/15/69 Filed original & 3 copies of appellant's reply memo as to the S. C. decision & the question left for decision by this court, affidavit & service (15563).

8/29/69 Filed 25 copies of memorandum of Zenith Radio Corp. as to the Supreme Court decision & the effect of its opinion, etc., service (15563).

8/29/69 Filed 25 copies of supplemental authorities of Hazeltine, etc. service (15563).

9/ 5/69 Filed 25 copies of appellant's reply to appellee's memorandum as to Supreme Court decision, service (15563).

9/ 5/69 Filed original & 3 copies of Hazeltine's motion for leave to file reply to Zenith's memorandum as to Supreme Court opinion, affidavit & service (15563).

9/ 5/69 Entered order granting motion of 9/5/69. (15563).

9/17/69 Filed original & 3 copies of appellee's motion for leave to file its brief (reply) to HRI's memo, etc., service & affidavit (15563)

10/27/69 Entered judgment vacated & that this cause be & it is hereby remanded to the said District Court for further proceedings consistent with the views expressed in the Opinion, further ordered that the costs of these appeals be divided equally between the parties (15563).

10/27/69 Filed opinion by Judge Kiley.

11/ 5/69 Filed original & 3 copies of appellee's motion to stay mandate, affidavit & service (15563).

11/ 6/69 Entered order granting motion of 11/5/69 (mandate stayed for 30 days) (15563).

12/ 5/69	Filed original & 3 copies of appellee's motion to stay mandate affidavit & service (15563).
12/ 8/69	Entered order granting motion of 12/5/69 (mandate stayed pending disposition of the Zenith petition for writ of mandamus). (15563).
1/30/70	Filed notice of docketing in Supreme Court as No. 1117 (15563).
3/20/70	Filed notice of granting writ of certiorari. (15563)
3/26/70	Filed stip re record on appeal (15563)

SUPREME COURT OF THE UNITED STATES

No. 49.—OCTOBER TERM, 1968.

ZENITH RADIO CORPORATION, *Petitioner*, *vs.* HAZELTINE RESEARCH, INC., et al. } On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[May 19, 1969.]

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner Zenith Radio Corporation (Zenith) is a Delaware Corporation which for many years has been successfully engaged in the business of manufacturing radio and television sets for sale in the United States and foreign countries. A necessary incident of Zenith's operations has been the acquisition of licenses to use patented devices in the radios and televisions it manufactures, and its transactions have included licensing agreements with respondent Hazeltine Research, Inc. (HRI), an Illinois corporation which owns and licenses domestic patents, principally in the radio and television fields. HRI is the wholly owned subsidiary of respondent Hazeltine Corporation (Hazeltine), a substantially larger and more diversified company that has among its assets numerous foreign patents—including the foreign counterparts of HRI's domestic patents —which it licenses for use in foreign countries.

Until 1959, Zenith had obtained the right to use all HRI domestic patents under HRI's so-called standard package license. In that year, however, with the expiration of Zenith's license imminent, Zenith declined to accept HRI's offer to renew, asserting that it no longer required a license

from HRI. Negotiations proceeded to a stalemate, and in November 1959, HRI brought suit in the Northern District of Illinois, claiming that Zenith television sets infringed HRI's patents on a particular automatic control system. Zenith's answer alleged invalidity of the patent asserted and noninfringement, and further alleged that HRI's claim was unenforceable because of patent misuse as well as unclean hands through conspiracy with foreign patent pools. On May 22, 1963, more than three years after its answer had been filed, Zenith filed a counterclaim against HRI for treble damages and injunctive relief, alleging violations of the Sherman Act by misuse of HRI patents, including the one in suit, as well as by conspiracy among HRI, Hazeltine, and patent pools in Canada, England, and Australia. Zenith contented that these three patent pools had refused to license the patents placed within their exclusive licensing authority, including Hazeltine patents, to Zenith and others seeking to export American-made radios and televisions into those foreign markets.

The District Court, sitting without a jury, ruled for Zenith in the infringement action, 239 F. Supp., at 68-69, and its judgment in that respect, which was affirmed by the Court of Appeals, 388 F. 2d, at 30-33, is not in issue here. On the counterclaim, the District Court ruled, first, that HRI had misused its domestic patents by attempting to coerce Zenith's acceptance of a five-year package license, and by insisting on extracting royalties from unpatented products. 239 F. Supp., at 69-72, 76-77. Judgment was entered in Zenith's favor for treble the amount of its actual damages of approximately $50,000, and injunctive relief against further patent misuse was awarded. Second, HRI and Hazeltine were found to have conspired with the foreign patent pools to exclude Zenith from the Canadian, English, and Australian markets. Hazeltine had granted the pools the exclusive right to license Hazeltine patents in

their respective countries and had shared in the pools' profits, knowing that each pool refused to license its patents for importation and that each enforced its ban on imports with threats of infringement suits. HRI, along with its coconspirator, Hazeltine, was therefore held to have conspired with the pools to restrain the trade or commerce of the United States, in violation of § 1 of the Sherman Act, 15 U. S. C. § 1, and was liable for injury caused Zenith's foreign business by the operation of the pools. 239 F. Supp., at 77-78. Total damages with respect to the three markets, when trebled, amounted to nearly $35,000,000.[1] Judgment

1. In its initial findings, handed down on January 25, 1965, 239 F. Supp., at 76, the District Court concluded that Zenith had suffered actual damages of $16,238,872 as a result of the restraints imposed by the three pools upon Zenith's export business during the four-year damage period:

Canada:	
Television	$5,826,896
Radio	470,495
England:	
Television	8,079,859
Radio	1,169,067
Australia:	
Television	625,786
Radio	66,769
Total	16,238,872

On April 5, 1965, the District Court entered partial judgment, awarding Zenith treble damages for patent misuse and treble damages with respect to Canada, but reserving jurisdiction for further hearings on damages in the English and Australian markets. The further proceedings were held in October and November 1965, after which the District Court amended its findings on damages for England and Australia:

England:	
Television	$4,312,924
Radio	745,102
Australia:	
Television	223,508
Radio	24,952
Total	5,306,486

in this amount was awarded Zenith, along with injunctive relief against further participation in any arrangement to prevent Zenith from exporting electronic equipment into any foreign market.

Relying upon its finding that HRI and Zenith had stipulated before trial that HRI and Hazeltine were to be considered as one entity for purposes of the litigation, see 239 F. Supp., at 69, the judgments for treble damages and injunctive relief, both with respect to patent misuse and conspiracy, were entered against Hazeltine as well as against the named counter-defendant, HRI.

On appeal by HRI and Hazeltine, the Court of Appeals set aside entirely the judgments for damages and injunctive relief entered against Hazeltine, ruling that the District Court lacked jurisdiction over that company and that the stipulation relied upon by the District Court was an insufficient basis for entering judgment against Hazeltine. 388 F. 2d, at 28-30. With respect to Zenith's patent misuse claim, the Court of Appeals affirmed the treble damage award against HRI, but modified in certain respects the District Court's injunction against further misuse. 388 F. 2d, at 33-35, 39.

The Court of Appeals also reversed the treble damage award for conspiracy to restrain Zenith's export trade. Without reaching any of the other issues presented by the appeal on this phase of the case, the court held that Zenith had failed to sustain its burden under § 4 of the Clayton

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These revisions reflect the proof submitted at the further proceedings, showing that government embargoes in England and Australia, in effect until 1959 and 1960 respectively, precluded entry by Zenith into the English and Australian markets. The District Court found, with respect to England, that because of the embargoes, Zenith's damages were zero for the first year of the damage period, 50% of the figure initially accepted by the court for the second year, 75% for the third, and 100% for the fourth. With respect to Australia, the District Court adopted a similar 0-50-75-100% revision of the original figures used by the court in computing the damage findings of January 25, 1965.

Act, 15 U. S. C. § 15, to prove the fact of damage—injury to its business—within the relevant four-year period preceding May 22, 1963, the date Zenith's counterclaim was filed.[2] Finally, the Court of Appeals struck the injunction against HRI's participation in conspiracies restricting Zenith's trade in foreign markets.

We granted certiorari, 391 U. S. 933, to consider among other things the question whether the Court of Appeals properly discharged its appellate function under Rule 52 (a) of the Federal Rules, which specifies that the findings of fact made by a District Court sitting without a jury are not to be set aside unless "clearly erroneous."

I. The Judgment Against Hazeltine.

The named plaintiff in the patent infringement complaint which began this litigation was HRI, not its parent, Hazeltine; Zenith's counterclaim named only HRI as the "counter-defendant," identifying HRI and Hazeltine as "counter-defendant and its parent." After Zenith had filed its answer and had delivered a draft of its counterclaim to HRI's attorneys—both the answer and the counterclaim alleging that HRI had unlawfully conspired with Hazeltine and foreign patent pools—HRI and Zenith stipulated that "for purposes of this litigation plaintiff

2. The record discloses that Zenith, HRI, and the courts below all considered the damage period to be the four years prior to the date on which Zenith filed its counterclaim. No argument was made that the counterclaim, in whole or in part, related back to an earlier pleading, thereby expanding the damage period to include years prior to 1959. Cf. *Bull* v. *United States*, 295 U. S. 247, 262 and n. 10 (1935); *Cold Metal Process Co.* v. *E. W. Bliss Co.*, 285 F. 2d 231 (C. A. 6th Cir. 1960), cert. denied, 366 U. S. 911 (1961). Compare Fed. Rule Civ. Proc. 15 (c) (amended pleading relates back to date of original pleading if the "claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading").

and its parent Hazeltine Corporation will be considered to be one and the same company."

On May 22, 1963, two weeks after the stipulation had been signed, Zenith filed its counterclaim, seeking money damages from HRI and an injunction against HRI and those "in privity" with it. Hazeltine was not served with the counterclaim and was not named as a party, although it was alleged to be a coconspirator with HRI and the foreign patent pools. Hazeltine made no appearance in the litigation until Zenith proposed that judgment be entered against it, at which time Hazeltine filed a "special appearance." Insofar as the record reveals, Hazeltine did not formally participate in the proceedings until after the District Court had entered its initial findings of fact and conclusions of law. On April 5, 1965, after Hazeltine's special appearance, the trial judge entered judgment against Hazeltine as well as HRI, thereby rejecting Hazeltine's objection that the court was without jurisdiction over it. Apparently, the trial court based its decision on the pretrial stipulation[3] and its earlier finding that:

"The parties stipulated that for purposes of this

3. During the proceedings before the District Court on April 2, 1965, the trial judge noted: "Well, of course, Hazeltine Corporation wasn't a party to the lawsuit." The court's reliance upon the stipulation as a basis for its decision to enter judgment against Hazeltine as well as HRI is reflected by the interchanges between the court and counsel for Hazeltine during those proceedings. An example is the following:

"Mr. Kayser [Counsel for Hazeltine]: . . . Could anyone really believe for a minute that if he had any thought of bringing the parent into this lawsuit that he would not have named them and that he would be relying on this stipulation which was intended to simplify and expedite the trial? Would any lawyer who has been practicing for two years expect to hold somebody liable on a judgment when he didn't even name them? He relied on some pretrial stipulation.

"The Court: You mean that pretrial stipulations are worthless?"

> litigation Hazeltine Research, Inc., and its parent, Hazeltine Corporation, would be considered as one entity operating as a patent holding and licensing company, engaged in the exploitation of patent rights in the electronics industry in the United States and in foreign countries." 239 F. Supp., at 69.

The Court of Appeals was quite right in vacating the judgments against Hazeltine. It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Hansbury* v. *Lee,* 311 U. S. 32, 40-41 (1940). The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. *E. g., Pennoyer* v. *Neff,* 95 U. S. 714 (1878); *Vanderbilt* v. *Vanderbilt,* 354 U. S. 416, 418 (1957).

Here, Hazeltine was not named as a party, was never served and did not formally appear at the trial. Nor was the stipulation an adequate substitute for the normal methods of obtaining jurisdiction over a person or a corporation. The stipulation represented HRI's agreement to be bound by and to be liable for the acts of its parent, but it was signed only by HRI, through its attorney, Dodds. Hazeltine did not execute the stipulation, and Dodds, although an officer of Hazeltine, did not purport to be signing on its behalf. The trial court apparently viewed the stipulation as binding Hazeltine, as equivalent to an entry of appearance, or as consent to entry of judgment against it. The stipulation on its face, however, hardly warrants this construction, and if there were other circumstances which justified the trial court's conclusion, the findings do not reveal them.

Perhaps Zenith could have proved and the trial court might have found that HRI and Hazeltine were *alter*

egos; but absent jurisdiction over Hazeltine, that determination would bind only HRI. If the *alter ego* issue had been litigated, and if the trial court had decided that HRI and Hazeltine were one and the same entity and that jurisdiction over HRI gave the court jurisdiction over Hazeltine, perhaps Hazeltine's appearance before judgment with full opportunity to contest jurisdiction would warrant entry of judgment against it. But that is not what occurred here. The trial court's judgment against Hazeltine was based wholly on HRI's stipulation. HRI may have executed the stipulation to avoid litigating the *alter ego* issue,[4] but this fact cannot foreclose Hazeltine, which has never had its day in court on the question of whether it and its subsidiary should be considered the same entity for purposes of this litigation.

Likewise, were it shown that Hazeltine through its officer, Dodds, in fact controlled the litigation on behalf of HRI, and if the claim were made that the judgment against HRI would be *res judicata* against Hazeltine because of this control, that claim itself could be finally adjudicated against Hazeltine only in a court with jurisdiction over that company.[5] See *G. & C. Merriam Co.*

4. There is some indication that the genesis of the stipulation was a pretrial conference, when a question was raised as to whether or not a subpoena served upon HRI could reach certain records of Hazeltine relating to the latter's foreign patents. Hazeltine, of course, argues that the stipulation's only purpose and effect were to facilitate discovery and trial by obviating the necessity of litigating whether or not Zenith could "pierce the corporate veil" between HRI and its parent.

5. In its brief in this Court, Zenith seems to argue that Hazeltine is estopped to deny that it is bound by the stipulation. Not only was HRI's counsel, Dodds, an officer of Hazeltine, but also Ruestow and Westermann, Hazeltine's general patent counsel and general counsel, were present during trial and failed to "repudiate" the construction allegedly given the stipulation by the parties at trial to the effect that it bound Hazeltine to any adjudication on the counterclaim. We find this theory untenable on the

v. *Saalfield*, 241 U. S. 22 (1916); *Schell* v. *Peter Eckrich & Sons, Inc.*, 365 U. S. 260 (1961).

Neither the judgment for damages nor the injunction against Hazeltine was proper. Although injunctions issued by federal courts bind not only the parties-defendant in a suit, but also those persons "in active concert or participation with them who receive actual notice of the order by personal service or otherwise," Fed. Rule Civ. Proc. 65 (d), a nonparty with notice cannot be held in contempt until shown to be in concert or participation. It was error to enter the injunction against Hazeltine, without having made this determination in a proceeding to which Hazeltine was a party.[6]

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record of this case, for the references during trial to the stipulation are equally consistent with the interpretation advanced by Hazeltine that the stipulation merely eliminated the necessity for Zenith to perform the time-consuming task of piercing the corporate veil in proving its counterclaim against HRI. Also, Ruestow and Westermann were called as witnesses during trial, and assuming they were present throughout the trial—a fact which is neither proved nor disproved by the record—their failure to repudiate Zenith's proposed construction of the stipulation is entirely consistent with the proposition that they were present only as witnesses, and not as authorized representatives for a person who might be bound by the litigation.

6. Just as the *alter ego* issue was not litigated after Hazeltine had made its special appearance and while it had an opportunity to be heard, see p. 8, *ante*, so the District Court evidently did not rely upon anything more than the stipulation as a basis for entering the injunction against Hazeltine as well as HRI. The record does not support the contention, implicit in Zenith's brief, that when Hazeltine appeared to contest jurisdiction it was found by the District Court to be "in active concert and participation" with HRI and that, by entering its special appearance, Hazeltine consented to be bound by such a finding. See generally Dobbs, The Validation of Void Judgments: The Bootstrap Principle (pts. 1 and 2), 53 Va. L. Rev. 1003, 1241 (1967).

II. The Foreign Patent Pools.

A. *The Treble-Damage Award.*

HRI's major points in the Court of Appeals were that no injury to Zenith's business during the damage period had been proved; that if Zenith had suffered injury, it resulted wholly or partly from conduct prior to May 22, 1959, and to this extent was barred by the statute of limitations and by Zenith's 1957 settlement of certain antitrust litigation against RCA, General Electric, and Western Electric, which had the effect of releasing HRI from all liability for pre-settlement acts of the foreign patent pools;[7] that the Hazeltine companies had not illegally conspired with foreign pools; and that the damage award was excessive. Passing the other issues pressed by HRI, including the limitations defense, the Court of Appeals held that Zenith had failed to prove any injury to its export business during the damage period which resulted from pool activities either before or after the beginning of the damage period, and that the District Court's finding to the contrary was clearly erroneous.[8]

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7. Although HRI and Hazeltine were not parties to this prior litigation and did not enter the settlement agreement, HRI urged that all joint tortfeasors, including HRI and Hazeltine, were released from liability for injuries flowing from the pre-settlement acts of the pools. The 1957 release appears to be relevant only to Zenith's claim for injury to its Canadian trade; the embargoes in England and Australia were thought by the District Court to preclude any injury from acts of the English and Australian pools, and the embargoes were not lifted until well after the settlement was executed.

8. The Court of Appeals did not disturb, nor do we, the findings of the District Court that HRI and Hazeltine conspired with the Canadian pool to deny patent licenses to companies seeking to export American-made goods to Canada. Accepting these findings, we have no doubt that the Sherman Act was violated. See, *e. g.*, *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 599

We have concluded that the Court of Appeals erred in setting aside the District Court's decision with respect to the fact of damage in Canada. Zenith's evidence, although by no means conclusive, was sufficient to sustain the inference that Zenith had in fact been injured to some extent[9] by the Canadian pool's restraints upon imports of radio and television sets. On the other hand, we agree with the Court of Appeals that the District Court erred as to the English and Australian markets.

1. *The Canadian Pool.*

The findings of the District Court with respect to the operations of the Canadian pool may be briefly summarized. The Canadian patent pool, Canadian Radio Patents, Ltd. (CRPL), was formed in 1962 by the General Electric Company of the United States through its subsidiary, Canadian General Electric Co., and by Westinghouse through its Canadian subsidiary. The pool was made up largely of Canadian manufacturers, most of which were subsidiaries

(1951); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 704 (1962). Once Zenith demonstrated that its exports from the United States had been restrained by pool activities, the treble damage liability of the domestic company participating in the conspiracy was beyond question. *Continental Ore Co.* v. *Union Carbide & Carbon Corp., supra.* Compare *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (1909); *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 443 (C. A. 2d Cir. 1950). Although patent rights are here involved, the same conclusions follow. See, for example, *United States* v. *Line Material Co.*, 333 U. S. 287, 305-315 (1948); *United States* v. *Singer Mfg. Co.*, 374 U. S. 174, 196-197 (1963).

9. Zenith's burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount, and not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 702 (1962); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 143-144 (1968) (concurring opinion).

of American companies. The pool for many years had the exclusive right to sublicense the patents of its member companies and also those of Hazeltine and a number of ohter foreign concerns. About 5,000 patents were available to the pool for licensing, and only package licenses were granted, covering all patents in the pool and strictly limited to manufacture in Canada. No license to importers was available. The chief purpose of the pool was to protect the manufacturing members and licensees from competition by American and other foreign companies seeking to export their products into Canada.

CRPL's efforts to prevent importation of radio and television sets from the United States were highly organized and effective. Agents, investigators, and manufacturer and distributor trade associations systematically policed the market; warning notices and advertisements advised distributors, dealers, and even consumers against selling or using unlicensed equipment. Infringement suits or threats thereof were regularly and effectively employed to dissuade dealers from handling American-made sets.

For many years Zenith attempted to establish distribution in Canada, but distributors were warned off by the pool, and Zenith's efforts to secure a license for American-made goods were unsuccessful. Zenith then brought an antitrust suit against RCA, General Electric, and Western Electric.[10] This litigation was favorably settled, Zenith receiving, among other things, worldwide licenses on patents owned by the named defendants. Armed with these and other licenses, Zenith in 1958 began exporting radio and television products to Canada. It was promptly informed by CRPL that to continue business in Canada, Zenith would be required to sign CRPL's standard license, which did not permit importation, and that to sell in

10. Zenith's antitrust claim was asserted as a counterclaim in a patent infringement suit brought by RCA against Zenith and its subsidiary, the Rauland Corporation.

Canada it must manufacture there. Zenith was notified at the time that it was infringing at least one of Hazeltine's patents which had been placed with CRPL for licensing in Canada. Soon after this demand by CRPL, HRI began its infringment suit against Zenith.

Some of the trial court's findings describing the operations of the Canadian pool and its "drastic" impact upon Zenith's foreign commerce did not date the events or state whether they had occurred before or after May 22, 1959. The damage award was confined to injuries sustained during the statutory period, but the trial court apparently deemed it immaterial whether the damage-causing acts occurred before or after the start of the damage period. Damages were awarded on the assumption that Zenith, absent the conspiracy, would have had 16% of the Canadian television market on May 22, 1959, and throughout the damage period rather than its actual 3% share.[11] Since the failure to have 16% of the market on the first day of the damage period was ascribed to pool operations, those operations must have occurred prior to May 22, 1959. Some part of the damages awarded, therefore, necessarily resulted from pre-damage period conduct.[12]

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11. The computation of damages, prepared by Zenith's experts and accepted by the District Court, see 239 F. Supp., at 76, reflects a comparison between Zenith's percentage share of the United States television market, ranging from 15.6% in 1959 to 21.7% in 1963, and Zenith's actual share of the Canadian market during the same period, ranging from 3.1% in 1959 to 5.2% in 1961 and down to 3.2% in 1963. Although we discuss only the measure of damages utilized for computing Zenith's injury in the Canadian television market, a comparable method was employed to determine Zenith's lost radio sales.

12. On November 22, 1965, during the further proceedings held to consider damages for England and Australia, Zenith's executive vice-president and treasurer, Kaplan testified:

> "In Canada, our assumption was that we commenced the period starting June 1, 1959, as if we had had a full blown organization, and had enjoyed the benefits of doing business there for years prior to that date."

The Court of Appeals reversed the District Court because it considered the evidence insufficient to prove the fact of any damage to Zenith after May 22, 1959. Having put aside HRI's statute of limitations defense, belatedly raised in the District Court and pressed in the Court of Appeals,[13] the import of the court's decision was that Zenith had not been damaged after May 22, 1959, by any act of the pool, whether occurring before or after that date. The Court of Appeals' overriding judgment—as it had to be if its no-injury rationale were to meet claims of damage period injury from pre-damage period conduct—was that Zenith would have done no more business in Canada after May 22, 1959, had the patent pool never operated in that country.

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13. HRI's answer to Zenith's counterclaim did not plead a statute of limitations defense. However, in the course of proceedings after entry of the District Court's initial findings of fact and conclusions of law, but before judgment, the trial court granted the oral motion of HRI's new counsel for "leave to file" defenses based on the statute of limitations and on the release given by Zenith pursuant to the 1957 settlement agreement. The thrust of the former was primarily that the findings as to Canada had erroneously included damages resulting from conduct occurring prior to May 22, 1959. The trial court, without further mention of these defenses, forthwith refused to set aside or amend the damage award as to Canada, thus either rejecting the statute of limitations defense or considering it to have been waived under Fed. Rule Civ. Proc. 12 (h), as urged by Zenith in both the District Court and the Court of Appeals.

Zenith itself had requested damages only for the four-year period prior to the filing of its counterclaim, and the findings of the District Court expressly limited the damages awarded to those occurring "during the 4-year statutory damage period." 239 F. Supp., at 76. The Court of Appeals, although not purporting to pass on the statute of limitations defense, referred to the "four year damage period" and identified it as "[f]our years prior to the May 22, 1963, filing date of Zenith's counterclaim. 15 U. S. C. Sec. 15b." 388 F. 2d, at 35 and n. 4. The parties have not argued the matter here, and we make no further effort to penetrate the confusion surrounding this issue or to deal with the question of whether damage period injury from pre-damage period conduct is recoverable where an unwaived statute of limitations defense is properly asserted.

The Court of Appeals was clearly in error. The evidence was quite sufficient to sustain a finding that competing business concerns and patentees joined together to pool their Canadian patents, granting only package licenses and refusing to license imported goods. Their clear purpose was to exclude concerns like Zenith from the Canadian market unless willing to manufacture there. Zenith, consequently, was never able to obtain a license. This fact and the pool's vigorous campaign to discourage importers, distributors, dealers, and consumers from selling, handling, or using unlicensed foreign merchandise effectively prevented Zenith from making any headway in the Canadian market until after the 1957 settlement with RCA and its co-defendants. And even in 1958, when Zenith undertook in earnest to establish its distribution system in Canada and to market its merchandise, Zenith was met with further pool advertisements threatening action against imported goods and further notifications, continuing past May 22, 1959, that its products were infringing pool patents and that no license was available unless Zenith manufactured in Canada.

This evidence clearly warrants the inference that CRPL's past conduct interfered with and made more difficult the distribution of Zenith products in 1959 and later years. The District Court could reasonably conclude that the cumulative effects of the pool's campaign against imported goods had consequences lasting well into the damage period. It could also rationally be found from the evidence that Zenith, beginning in 1958, could not have reached its maximum potential by May 22, 1959, that the pool had effectively prevented an earlier beginning, and that Zenith therefore suffered damage during the damage period from having a smaller share of the market than it would have had if the pool had never existed.

We also conclude that the record evidence is sufficient to support a finding of damage resulting from events occurring after the beginning of the damage period. We need not merely assume that the Canadian pool continued throughout the period of this suit, as we are entitled to do in the absence of clear evidence of its termination. See, *e.g.*, *Local 167* v. *United States*, 291 U. S. 293, 297-298 (1934); *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 333 (1952). HRI frankly conceded the continuation of the pool before the District Court,[14] and it appears sufficiently clear that throughout this time Zenith was deprived of what had always been refused it—a license on pool patents permitting it to sell American-made merchandise in Canada.

On May 12, 1959, the pool manager conferred with Zenith's vice president, informing him that Zenith was infringing pool patents and would require a license, but that licenses were granted only for local manufacture. This was followed on June 5, 1959, by a letter stating without reservation that Zenith receivers were infringing and enclosing the pool's standard license form. This was nothing more nor less than a demand during the damage period that Zenith either manufacture in Canada and take the stand-

14. On April 1, 1965, during the further proceedings held by the District Court before judgment, counsel for HRI stated:

> "Now what [counsel for Zenith] is really trying to sell this court is the idea that if he can show that these pools continued after 1957 and, as he defines the pools, yes, yes, they did. There is no question about it, that these arrangements in relation to patents—that characterized necessarily as he characterizes them, but that these arrangements have continued and, so far as I know, are in existence today. There is no question about that."

HRI does contend, however, that the ties between the Canadian pool and the Hazeltine companies were broken in December 1965, when Hazeltine secured an early termination of its licensing agreement with CRPL. See n. 25, *infra*.

ard package license or cease its activities in that country.[15] There is no evidence that the pool ever retreated from that position during the next four years.

Zenith thus continued to operate without a patent license unburdened by conspiratorial conduct and granted on terms which would satisfy the antitrust laws. This deprivation in itself necessarily had an impact on Zenith and constituted an injury to its business. We find singularly unpersuasive the argument that Zenith was as well off without a license as with one. This is little more than an assertion that pool licenses, from which CRPL and its participants enjoyed substantial income, were without value. Without the license, doing business in Canada obviously involved weighty risks for Zenith itself, besides requiring it to convince the trade that it could legally and effectively do business without clearance from CRPL.[16]

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15. That Zenith failed to make a formal request for a CRPL license during the damage period can properly be attributed to Zenith's recognition that such a request would have been futile. The pool had made its position entirely clear, and under these circumstances the absence of a formal request is not fatal to Zenith's case. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 699-702 (1962); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 487, n. 5 (1968).

16. In 1960, the Report of the Royal Commission on Patents, Copyright and Industrial Designs was published. This Report described the magnitude of the risk taken by Zenith and its distributors in selling imported products in Canada:

> "The portfolio in respect of which CRPL had the right to grant licences consisted of 5,000 patents, and in the absence of a licence from CRPL it is doubtful if anyone could sell in Canada a radio or television receiver.
>
> "CRPL indicated that it does not grant a licence to any importer of radio or television receivers . . . . It is particularly in respect of the policy of CRPL in precluding importers from bringing into Canada radio and television receivers that the complaint was made to this Commission.
>
> "It was stated to be the policy of CRPL to enforce its patent rights against any person who sells in Canada an imported radio or television receiver which infringes any one or more of the patents in its portfolio . . . ."

Of course, Zenith determined to take these risks, serious as they were. Although HRI brought the instant litigation claiming infringement of an HRI domestic patent, the foreign counterpart of which had been made available to the Canadian pool by Hazeltine, Zenith persevered in its Canadian efforts. The claim is now pressed, and the Court of Appeals so held, that the pool bothered neither Zenith nor its distributors after mid-1959 and that Zenith ran the gauntlet so successfully that not having a license made no difference whatsoever.

It is true that the record discloses no specific instance of subsequent infringement suits or threats against Zenith's existing or potential distributors or dealers. But there is evidence that the pool was not dormant after May 1959. The record contains a letter from the pool to a distributor of Motorola products containing clear warnings against handling unlicensed, imported merchandise.[17] More significant, the fair import of the testimony by Zenith officers was that the pool remained active during the damage period and prevented Zenith from establishing an effective distribution system throughout Canada. Zenith was able to obtain independent distributors in the Western Provinces, but it was unable to do so in the Central and the Maritime Provinces, where it necessarily relied on its own subsidiaries for distribution. These officers, experienced businessmen, also testified to the similarities between the Canadian and American markets, attributing Zenith's much poorer Ca-

17. This letter, brought to Zenith's attention by an ex-Zenith dealer, warned the Motorola dealer that his importation of American-made television sets and FM radios probably infringed pool patents. The dealer not only was cautioned that CRPL remained willing to litigate infringements, describing two recent and successful suits, but also was reminded of CRPL's policy against licensing imports:

> "In closing, I wish to inform you that we would be most happy to issue a license to you to make or have made in Canada any equipment coming within the ambit of our patents."

nadian performance to the discouraging and repressive effects of the pool. The Court of Appeals did not refuse to credit this testimony, as HRI insists we should do,[18] but accepting it as some evidence of damage, considered it of insufficient weight to prove injury to Zenith's business. In this respect the Court of Appeals both gave insufficient deference to the findings of the trial judge and failed to adhere to the teachings of *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251 (1945), and other cases dealing with the standard of proof in treble-damage actions.

In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the

18. HRI urges that the trial testimony as to Canada of each of two Zenith officers, Wright and Kaplan, was inconsistent with his own testimony on recall, inconsistent with the testimony of the other, and inconsistent with documentary evidence, and that we should therefore disregard their testimony. It is true that the trial judge's views as to credibility are not completely impervious, but Rule 52(a) admonishes due regard for the trial court's opportunity to assess the credibility of witnesses. The Court of Appeals clearly took into account this evidence, and we see no adequate basis in the record for refusing to accept the testimony of the two Zenith officers as probative evidence. See *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 37-38 (1918); *Walling* v. *General Industries Co.*, 330 U. S. 545, 550 (1947); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 339 U. S. 605, 609-612 (1950); *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 332 (1952); *Orvis* v. *Higgins*, 180 F. 2d 537, 539-540 (C. A. 2d Cir.), cert. denied, 340 U. S. 810 (1950); *Ruth* v. *Utah Construction & Mining Co.*, 344 F. 2d 952 (C. A. 10th Cir. 1965). HRI relies heavily in this respect on Zenith's annual reports for the years 1957-1962, but aside from the fact that these reports, except for 1962, were never admitted into evidence, we find them quite insufficient to undermine the credibility of Wright and Kaplan.

evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948). See also *United States* v. *National Assn. of Real Estate Boards*, 339 U. S. 485, 495-496 (1950); *Commissioner* v. *Duberstein*, 363 U. S. 278, 289-291 (1960).

Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible to the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." *Bigelow* v. *RKO Pictures, Inc., supra*, 327 U. S., at 264. See also *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 377-379 (1927); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 561-566 (1931).

In *Bigelow*, a treble-damage plaintiff claimed injury from a conspiracy among film distributors to deny him first-run pictures. He offered evidence comparing his profits with those of a competing theater granted first-run showings and also measuring his current profits against those earned when first-run films had been available to him. This Court, reversing the Court of Appeals,

found the evidence sufficient to sustain an award of damages. Although the factfinder is not entitled to base a judgment on speculation or guesswork,

> "the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances, 'juries are allowed to act upon probable and inferential, as well as direct and positive proof.' *Story Parchment Co.* v. *Paterson Co., supra,* 561-564; *Eastman Kodak Co.* v. *Southern Photo Co., supra,* 377-379. Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery." 327 U. S., at 264-265.

Here, Zenith was denied a valuable license and submitted testimony that without the license it had encountered distribution difficulties which prevented its securing a share of the market comparable to that which it enjoyed in the United States, and which its business proficiency, demonstrated in the United States, dictated it should have obtained in Canada. CRPL was an established organization with a long history of successfully excluding imported merchandise; and in view of its continued existence during the damage period, the injury alleged by Zenith was precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause. The trial court was entitled to infer from this circumstantial evidence that the necessary causal relation between the pool's conduct and the claimed damage existed. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 696-701 (1962).

2. *TheEnglish Pool.*

Hazeltine patents were made available to the English pool in 1930. The pool issued only package licenses, restricted to local manufacture. Although pool radio patents had expired prior to the beginning of the damage period, the trial court found, and we assume, that the pool held television patents which would not be licensed for television sets made in the United States.[19] Zenith was interested in the English market and made exclusive arrangements with one distributor desiring to handle its merchandise. At no time during or before the damage period, however, did Zenith make available or offer for sale a substantial number of television sets suitable for the English market or make any other serious efforts to enter that market. It attained no appreciable position in the English television market.

Having initially found the patent pool responsible over the years for Zenith's failure to participate in the English market, the trial court, after further proceedings, held that a government embargo, not the patent pool, was the sole reason for Zenith's not entering the English market prior to the beginning of the damage period in 1959; until then, the District Court found, the pool "was not called upon to exercise the type of conduct that they exercised in Canada." It did not, however, retreat from its conclusion that restraints imposed by the pool had

19. Wright testified that in mid-1955, a representative of the English pool had confirmed his understanding that "the policy of the pool . . . required that [radio and television] sets be made in England, and that nothing would be licensed if it was imported from abroad." Wright further testified that the pool representative "saw no possibility" that this restrictive policy would be changed in the future. Subsequently, during its dealings with its English radio distributor, Zenith was "given to understand that the television was just out of the question."

foreclosed Zenith during the damage period.[20] In this respect we agree with the Court of Appeals that the trial court clearly erred. Based on our own examination of the record, we are convinced that even with the ending of the embargo in mid-1959, Zenith faced other obstacles which effectively discouraged its entry into the English market and for which the pool was not responsible.

Positing that Zenith could not get a license from the English pool and that it did not enter the British market before or during the damage period, the issue is whether, once the embargo was lifted, Zenith wanted and intended to enter, had the capacity to do so, and was prevented from entering by its inability to secure a patent license and by other operations of the English patent pool. Section 4 of the Clayton Act required that Zenith show an "injury to its business or property by reason of anything forbidden in the antitrust laws." If Zenith's failure to enter the English market was attributable to its lack of desire, its limited production capabilities, or to other factors independent of HRI's unlawful conduct, Zenith would not have met its burden under § 4.[21]

Zenith was interested in the English market; this much is clear. But its standard domestic television set was manufactured to operate on 525 and 625-line-per-second scanning signals, whereas the 405-line signal was

20. Because the embargo precluded any recovery by Zenith for the first year of the damage period, the trial court modified its initial measure of damages to reflect the time it would have taken Zenith, starting with the removal of the embargo, to build up its market share. See n. 1, *supra*.

21. See *American Banana Co.* v. *United Fruit Co.*, 166 F. 261, 264 (C. A. 2d Cir. 1908), affirmed without specific reference to this issue, 213 U. S. 347 (1909); *Stearns* v. *Tinker & Rasor*, 252 F. 2d 589, 606 (C. A. 9th Cir. 1958); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F. 2d 383, 395-396 (C. A. 6th Cir. 1962), cert. denied, 372 U. S. 907 (1963). Compare *Pennsylvania Sugar Rfg. Co.* v. *American Sugar Rfg. Co.*, 166 F. 254, 260 (C. A. 2d Cir. 1908).

standard in England until after the damage period. Similarly, while FM transmission was utilized in the United States for the audio portion, AM signals were used in England. Zenith's regular product thus was not salable in the English market. To succeed at all, Zenith had either to produce a differently equipped set or provide for the mass conversion of its standard receivers. Unquestionably, the company had the facilities and the ability to follow either course. But it is equally clear that it pursued neither.[22] A change in the standard British broadcast to include a 625-line signal was under consideration, even imminent, during the damage period. Zenith's merchandise would in any event have sold at prices substantially higher than those prevailing in the English market; tariffs and freight costs tended to widen the differential. Producing a new set for the English market, or modifying existent models on a large-scale basis, would have involved substantial costs.

Based on the evidence before us, including the correspondence between Zenith and its British representative, we think the Court of Appeals correctly rejected the inference that "Zenith intended to and was prepared to enter the English television market during the damage period," and correctly concluded that Zenith was in fact

22. During trial, Wright and Kaplan testified that adjustments could be made by Zenith's English distributor in his shop to adapt Zenith television sets to the English transmission system. However, the fair import of their testimony, both during trial and in November 1965 on recall, was that conversion of Zenith sets to the English system, whether done before shipment to England or in the distributor's shop, had in fact been carried out only occasionally in the past and was of questionable utility on a commercial basis. Wright and Kaplan stated that Zenith could have manufactured a television set suitable for English use without appreciably more difficulty than Zenith faced in producing a new model for the American market, but the record does not indicate that Zenith took any steps in this direction before the end of the damage period, except in anticipation of the British changeover to the 625 line-per-second transmission system.

"waiting for a change in English standards to a 625-line system." 388 F. 2d, at 37. It clearly emerges from the evidence that Zenith had every intention to promote the sale of its television sets if and when the signal change occurred. Given that event, neither the absence of a pool license nor pool threats against it or its customers would have deterred Zenith from a major effort to penetrate the British market. Why the existence of the pool, which as far as the record shows was quiescent during the damage period, should be credited with the power to discourage Zenith's entry before the signal change but not after is difficult to grasp. But the question at hand is not whether, if Zenith had decided to enter the market, the pool would have been a deterrent and inflicted damage. Rather, it is whether Zenith was in fact constrained by the pool to stay out of England during the damage period or whether Zenith's own business calculus led it to await more favorable conditions. As we have said, the latter is the only permissible inference from this record.

3. *The Australian Pool.*

The Australian patent pool, which had exclusive rights to license Hazeltine patents, also granted licenses only for local manufacture. Had HRI and Hazeltine's conspiracy with the Australian pool effectively kept Zenith from that market, a compensable violation of the antitrust laws unquestionably would have occurred. But the findings of the District Court are wholly silent as to how the Australian pool had any impact on Zenith's business. An officer of Zenith revealed that Zenith had exported no products to Australia since the 1920's or early 1930's. Zenith had not requested a pool license during the 20-year period preceding the trial. A government embargo was found by the District Court

to have foreclosed Zenith's American-made merchandise until well into the damage period. High tariffs and shipping costs were additional barriers, as well as the prospect of vigorous competition. Nothing in the record before us would permit the inference that Zenith either intended or was prepared to enter the Australian market during the damage period. The Court of Appeals was correct in reversing the District Court's award of damages with respect to the Australian market.

B. *The Injunction.*

In setting aside the District Court's grant of injunctive relief against continued participation by HRI and Hazeltine in any patent pool or similar association restricting Zenith's export trade,[23] the Court of Appeals stated, without more:

> "It follows from our conclusion with respect to the foreign patent pools that injunctive relief against 'threatened loss or damage' directed at those pools, alleged by Zenith to be unlawful conspiracies, cannot be justified under 15 U. S. C. § 26. Paragraph C of the injunction granted must be stricken." 388 F. 2d, at 39.

The evident premise for striking Paragraph C was that Zenith's failure to prove the fact of injury barred injunctive relief as well as treble damages. This was unsound, for § 16 of the Clayton Act, 15 U. S. C. § 26, which was

23. Paragraph C of the District Court's injunction prohibits HRI from

> "Entering into, adhering to, enforcing or claiming any rights under any contract, agreement, understanding, plan or program, with any other person, company, patent pool, organization, association, corporation or entity which directly or indirectly restricts or prevents defendant-counterclaimant, Zenith Radio Corporation, or any of its subsidiaries, from exporting any electronic apparatus from the United States into any foreign market."

enacted by the Congress to make available equitable remedies previously denied private parties, invokes traditional principles of equity and authorizes injunctive relief upon the demonstration of "threatened" injury.[24] That remedy is characteristically available even though the plaintiff has not yet suffered actual injury, see *Bedford Cut Stone Co.* v. *Journeymen, Stone Cutters' Assn.*, 274 U. S. 37, 54-55 (1927); he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur. See *Swift & Co.* v. *United States*, 196 U. S. 375, 396 (1905); *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn., supra*, at 54; *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 333 (1952); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953).

Moreover, the purpose of giving private parties treble damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws. *E. g., United States* v. *Borden Co.*, 347 U. S. 514, 518 (1954). Section 16 should be construed and applied with this purpose in mind, and with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice "adjustment and reconcilation between the public interest and private needs, as well as between competing private claims." *Hecht Co.* v. *Boles*, 321 U. S. 321, 329-330 (1944). Its availability should be "conditioned by the necessities

24. Section 16 provides:

"Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, *against threatened loss or damage by a violation of the antitrust laws*, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . ." (Emphasis added.)

of the public interest which Congress has sought to protect." *Ibid.*

Judged by the proper standard, the record before us warranted the injunction with respect to Canada. The findings of the District Court were that HRI and CRPL were conspiring to exclude Zenith and others from the Canadian market; there was nothing indicating that this clear violation of the antitrust laws had terminated or that the threat to Zenith inherent in the conduct would cease in the foreseeable future. Neither the relative quiescence of the pool during the litigation nor claims that objectionable conduct would cease with the judgment negated the threat to Zenith's foreign trade.[25] That threat was too clear for argument, and injunctive relief against HRI with respect to the Canadian market was wholly proper.

We also reinstate the injunction entered by the District Court insofar as it more broadly barred HRI from conspiring with others to restrict or prevent Zenith from entering any other foreign market. In exercising its equitable jurisdiction, "[a] federal court has broad power to restrain acts which are of the same type or class as un-

25. HRI informs us that Hazeltine, having obtained an early termination of its licensing agreement with CRPL, is now prepared to license any one or more of its Canadian patents "with no restriction on imports." Since Hazeltine's abandonment of its participation in the Canadian pool occurred only after—and, apparently, in response to—the District Court's judgment and decree, we cannot agree with the suggestion that injunctive relief as to Canada has been rendered unnecessary and inappropriate. See *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 333 (1952); *United States* v. *Concentrated Phosphate Export Assn.*, 393 U. S. 199, 202-203 (1968). Although HRI is free to attempt to demonstrate in the future that the need for injunctive relief with respect to Canada has now been eliminated, or that a change of circumstances elsewhere justifies additional modifications of the injunction, see, *e. g.*, *United States* v. *W. T. Grant Co.*, 346 U. S. 629, 633-636 (1953), we are not willing at this time to undertake a reappraisal of the injunction in light of post-trial developments.

lawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past." *NLRB* v. *Express Publishing Co.*, 312 U. S. 426, 435 (1941). See also *United States* v. *National Lead Co.*, 332 U. S. 319, 328-335 and n. 4 (1947). Given the findings that HRI was conspiring with the Canadian pool, its purpose to exclude Zenith from Canada and its violation of the Sherman Act were clearly established. Its propensity for arrangements of this sort was also indicated by the findings revealing its participation in similar pools operating in England and Australia.[26] Zenith, a company interested in expanding its foreign commerce and having suffered at the hands of HRI and its coconspirators in the Canadian market, was entitled to injunctive relief against like conduct by HRI in other world markets. We see no reason that the federal courts, in exercising the traditional equitable powers extended to them by §16, should not respond to the "salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts." *NLRB* v. *Express Publishing Co.*, *supra*, at 436. Although a district court may not enjoin all future illegal conduct of the defendant, or even all future violations of the antitrust laws, however unrelated to the violation found by the court, *e. g.*, *New York, N. H. & H. RR.* v. *I. C. C.*, 200 U. S. 361, 401 (1906), "[w]hen the purpose to restrain trade appears from a clear viola-

26. Having not disturbed the District Court's findings that HRI and Hazeltine were conspiring with English and Australian patent pools which refused to license imports, the Court of Appeals in any event should have sustained the injunction with respect to the English and Australian markets. These findings, together with Zenith's demonstrated intent to expand its export business, were sufficient foundation for the conclusion that continued participation by HRI and Hazeltine in the English and Australian pools posed a significant threat of loss or damage to Zenith's business.

tion of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed." *International Salt Co.* v. *United States*, 332 U. S. 392, 400 (1947). This is particularly true in treble-damage cases, which are brought for private ends, but which also serve the public interest in that "they effectively pry open to competition a market that has been closed by defendants' illegal restraints." *Id.*, at 401.

III. The Patent Misuse Issue.

Since the District Court's treble damage award for patent misuse was affirmed by the Court of Appeals, and HRI has not challenged that award in this Court, the only misuse issue we need consider at length is whether the Court of Appeals was correct in striking the last clause from Paragraph A of the injunction,[27] which enjoined HRI from

> "A. Conditioning directly or indirectly the grant of a license to defendant-counterclaimant, Zenith Radio Corporation, or any of its subsidiaries, under any other patent *or upon the paying of royalties on the manufacture, use or sale of apparatus not covered by such patent.*" (Emphasis added.)

27. The District Court's injunction also included a paragraph barring HRI from continuing to coerce acceptance of its package license through the mechanism of offering a much lower royalty rate for those licensees who take a license on the entire package of patents rather than a license on merely a few of them. Paragraph B enjoined HRI from

> "Conditioning directly or indirectly the grant of any license to defendant-counterclaimant, Zenith Radio Corporation, or any of its subsidiaries, under any domestic patent upon the payment of the same or greater royalty rate than the rate at which licenses have been granted or offered to others under a group of domestic patents which includes said patent."

The Court of Appeals modified this paragraph in certain respects, 388 F. 2d, at 39, but we do not disturb these modifications.

This paragraph of the injunction was directed at HRI's policy of insisting upon acceptance of its standad five-year package license agreement, covering the 500-odd patents within its domestic licensing portfolio and reserving royalties on the licensee's total radio and television sales, irrespective of whether the licensed patents were actually used in the products manufactured.[28]

In striking the last clause of Paragraph A the Court of Appeals, in effect, made two determinations. First, under its view of *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U. S. 827 (1950), conditioning the grant of a patent license upon payment of royalties on unpatented products was not misuse of the patent. Second, since such conduct did not constitute patent misuse, neither could it be violative of the antitrust laws within the meaning of § 16 of the Clayton Act, under which Zenith had sought and the District Court had granted the injunction. With respect to the first determination, we reverse the Court of Appeals. We hold that conditioning the grant of a patent license upon payment of royalties on products which do not use the teaching of the patent does amount to patent misuse.

The trial court's injunction does not purport to prevent the parties from serving their mutual convenience by basing royalties on the sale of all radios and television sets, irrespective of the use of HRI's inventions. The injunction reaches only situations where the patentee directly or indirectly "conditions" his license upon the payment of royal-

28. The District Court concluded:

"Plaintiff's demands that royalties be paid on admittedly unpatented apparatus constitute misuse of its patent rights and plaintiff cannot justify such use of the monopolies of its patents, by arguing the necessities and convenience to it of such a policy. While parties in an arms-length transaction are free to select any royalty base that may suit their mutual convenience, a patentee has no right to demand or force the payment of royalties on unpatented products." 239 F. Supp., at 77.

ties on unpatented products—that is, where the patentee refuses to license on any other basis and leaves the licensee with the choice between a license so providing and no license at all. Also, the injunction takes effect only if the license is conditioned upon the payment of royalties "on" merchandise not covered by the patent—where the express provisions of the license or their necessary effect is to employ the patent monopoly to collect royalties not for the use of the licensed invention, but for using, making, or selling an article not within the reach of the patent.

A patentee has the exclusive right to manufacture, use, and sell his invention. See, *e.g.*, *Bement* v. *National Harrow Co.*, 186 U. S. 70, 88-89 (1902). The heart of his legal monopoly is the right to invoke the State's power to prevent others from utilizing his discovery without his consent. See, *e.g.*, *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U. S. 405 (1908); *Crown Die & Tool Co.* v. *Nye Tool & Machine Works*, 261 U. S. 24 (1923). The law also recognizes that he may assign to another his patent, in whole or in part, and may license others to practice his invention. See, *e.g.*, *Waterman* v. *Mackenzie*, 138 U. S. 252, 255 (1891). But there are established limits which the patentee must not exceed in employing the leverage of his patent to control or limit the operations of the licensee. Among other restrictions upon him, he may not condition the right to use his patent on the licensee's agreement to purchase, use, or sell, or not to purchase, use, or sell, another article of commerce not within the scope of his patent monopoly. *E.g.*, *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 455-459 (1940); *International Salt Co.* v. *United States*, 332 U. S. 392, 395-396 (1947). His right to set the price for a license does not extend so far, whatever privilege he has "to exact royalties as high as he can negotiate." *Brulotte* v. *Thys Co.*, 379 U. S. 29, 33 (1964). And just as the patent's leverage may not be used to extract from the licensee

a commitment to purchase, use, or sell other products according to the desires of the patentee, neither can that leverage be used to garner as royalties a percentage share of the licensee's receipts from sales of other products; in either case, the patentee seeks to extend the monopoly of his patent to derive a benefit not attributable to use of the patent's teachings.

In *Brulotte* v. *Thys Co., supra*, the patentee licensed the use of a patented machine, the license providing for the payment of a royalty for using the invention after, as well as before, the expiration date of the patent. Recognizing that the patentee could lawfully charge a royalty for practicing a patented invention prior to its expiration date and that the payment of this royalty could be postponed beyond that time, we noted that the post-expiration royalties were not for prior use but for current use, and were nothing less than an effort by the patentee to extend the term of his monopoly beyond that granted by law. *Brulotte* thus articulated in a particularized context the principle that a patentee may not use the power of his patent to levy a charge for making, using, or selling products not within the reach of the monopoly granted by the Government.

Automatic Radio is not to the contrary; it is not authority for the proposition that patentees have *carte blanche* authority to condition the grant of patent licenses upon the payment of royalties on unpatented articles. In that case, Automatic Radio acquired the privilege of using all present and future HRI patents by promising to pay a percentage royalty based on the selling price of its radio receivers, with a minimum royalty of $10,000 per year. HRI sued for the minimum royalty and other sums. Automatic Radio asserted patent misuse in that the agreement extracted royalties whether or not any of the patents were in any way used in Automatic Radio receivers. The District Court and the Court of Appeals approved the agreement as

a convenient method designed by the parties to avoid determining whether each radio receiver embodied an HRI patent. The percentage royalty was deemed an acceptable alternative to a lump sum payment for the privilege to use the patents. This Court affirmed.

Finding the tie-in cases such as *International Salt Co.* v. *United States*, 332 U. S. 392 (1947), inapposite, and distinguishing *United States* v. *United States Gypsum Co.*, 333 U. S. 364 (1948), as involving a conspiracy between patentee and licensees to eliminate competition, the Court considered reasonable "the payment of royalties according to an agreed percentage of the licensee's sales," since "[s]ound business judgment could indicate that such payment represents the most convenient method of fixing the business value of the privileges granted by the licensing agreement." 339 U. S., at 834. It found nothing "inherent" in such a royalty provision which would extend the patent monopoly. Finally, the holding by the Court was stated to be that in licensing the use of patents "it is not *per se* a misuse of patents to measure the consideration by a percentage of the licensee's sales."

Nothing in the foregoing is inconsistent with the District Court's injunction against conditioning a license upon the payment of royalties on unpatented products or with the principle that patent leverage may not be employed to collect royalties for producing merchandise not employing the patented invention. The Court's opinion in *Automatic Radio* did not deal with the license negotiations which spawned the royalty formula at issue and did not indicate that HRI used its patent leverage to coerce a promise to pay royalties on radios not practicing the learning of the patent. No such inference follows from a mere license provision measuring royalties by the licensee's total sales even if, as things work out, only some or none of the merchandise employs the patented

idea or process, or even if it was foreseeable that some undetermined portion would not contain the invention. It could easily be, as the Court indicated in *Automatic Radio*, that the licensee as well as the patentee would find it more convenient and efficient from several standpoints to base royalties on total sales than to face the burden of figuring royalties based on actual use.[29] If convenience of the parties rather than patent power dictates the total-sales royalty provision, there are no misuse of the patents and no forbidden conditions attached to the license.

The Court also said in *Automatic Radio* that if the licensee bargains for the privilege of using the patent in all of his products and agrees to a lump sum or a percentage-of-total-sales royalty, he cannot escape payment on this basis by demonstrating that he is no longer using the invention disclosed by the patent. We neither disagree nor think such transactions are barred by the trial court's injunction. If the licensee negotiates for "the privilege to use any or all of the patents and developments as [he] desire[s] to use them," 339 U. S., at 834, he cannot complain that he must pay royalties if he chooses to use none of them. He could not then charge that the patentee had refused to license except on the basis of a total-sales royalty.

But we do not read *Automatic Radio* to authorize the patentee to use the power of his patent to insist on a total-sales royalty and to override protestations of the licensee that some of his products are unsuited to the patent or that for some lines of his mechandise he has no need or desire to purchase the privileges of the patent. In such event, not only would royalties be collected on

29. The record and oral argument in *Automatic Radio* disclose no basis for the conclusion that Automatic Radio was forced into accepting the total-sales royalty rate by HRI's use of its patent leverage.

unpatented merchandise, but the obligation to pay for non-use would clearly have its source in the leverage of the patent.

We also think patent misuse inheres in a patentee's insistence on a percentage-of-sales royalty, regardless of use, and his rejection of licensee proposals to pay only for actual use. Unquestionably, a licensee must pay if he uses the patent. Equally, however, he may insist upon paying only for use, and not on the basis of total sales, including products in which he may use a competing patent or in which no patented ideas are used at all. There is nothing in the right granted the patentee to keep others from using, selling, or manufacturing his invention which empowers him to insist on payment not only for use but for producing products which do not employ his discoveries at all.

Of course, a licensee cannot expect to obtain a license, giving him the privilege of use and insurance against infringement suits, without at least footing the patentee's expenses in dealing with him. He cannot insist upon paying on use alone and perhaps, as things turn out, pay absolutely nothing because he finds he can produce without using the patent. If the risks of infringement are real and he would avoid them, he must anticipate some minimum charge for the license—enough to insure the patentee against loss in negotiating and administering his monopoly, even if in fact the patent is not used at all. But we discern no basis in the statutory monopoly granted the patentee for his using that monopoly to coerce an agreement to pay a percentage royalty on merchandise not employing the discovery which the claims of the patent define.

Although we have concluded that *Automatic Radio* does not foreclose the injunction entered by the District Court, it does not follow that the injunction was other-

wise proper. Whether the trial court correctly determined that HRI was conditioning the grant of patent licenses upon the payment of royalties on unpatented products has not yet been determined by the Court of Appeals. And if there was such patent misuse, it does not necessarily follow that the misuse embodies the ingredients of a violation of either § 1 or § 2 of the Sherman Act, or that Zenith was threatened by a violation so as to entitle it to an injunction under § 16 of the Clayton Act. See, *e. g. Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488, 490 (1942); *Transparent-Wrap Machine Corp.* v. *Stokes & Smith Co.*, 329 U. S. 637, 641 (1947); *Laitram Corp.* v. *King Crab, Inc.*, 245 F. Supp. 1019 (D. C. D. Alaska 1965). See also Report of the Attorney General's National Committee to Study the Antitrust Laws, at 254 (1955); Nordhaus & Jurow, Patent-Antitrust Law 122-123 (1961); Frost, Patent Misuse As A Per Se Antitrust Violation, in Conference on the Antitrust Laws and the Attorney General's Committee Report 113-123 (Ed. Rahl & Zaidins 1955). Compare Staff of Antitrust Subcomm. of House Comm. on the Judiciary, 84th Cong., 2d Sess., Antitrust Problems in the Exploitation of Patents 23 (Comm. Print. 1956); Schueller, The New Antitrust Illegality Per Se: Forestalling and Patent Misuse, 50 Col. L. Rev. 170, 184-200 (1950). Whether the findings and the evidence are sufficient to make out an actual or threatened violation of the antitrust laws so as to justify the injunction issued by the District Court has not been considered by the Court of Appeals, and we leave the matter to be dealt with by that court in the first instance.

Accordingly, the judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 49.—OCTOBER TERM, 1968.

ZENITH RADIO CORPORATION, *Petitioner*, *vs.* HAZELTINE RESEARCH, INC., et al. } On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[May 19, 1969.]

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

I concur in Parts I and II of the Court's opinion. However, I do not join Part III, in which the Court holds that a patent license provision which measures royalties by a percentage of the licensee's total sales is lawful if included for the "convenience" of both parties but unlawful if "insisted upon" by the patentee.

My first difficulty with this part of the opinion is that its test for validity of such royalty provisions is likely to prove exceedingly difficult to apply and consequently is apt to engender uncertainty in this area of business dealing, where certainty in the law is particularly desirable. In practice, it often will be very hard to tell whether a license provision was included at the instance of both parties or only at the will of the licensor. District courts will have the unenviable task of deciding whether the course of negotiations establishes "insistence" upon the suspect provision. Because of the uncertainty inherent in such determinations, parties to existing and future licenses will have little assurance that their agree-

ments will be enforced. And it may be predicted that after today's decision the licensor will be careful to embellish the negotiations with an alternative proposal, making the court's unravelling of the situation that much more difficult.

Such considerations lead me to the view that any rule which causes the validity of percentage-of-sales royalty provisions to depend upon subsequent judicial examination of the parties' negotiations will disserve rather than further the interests of all concerned. Hence, I think that the Court has fallen short in failing to address itself to the question whether employment of such royalty provisions should invariably amount to patent misuse.[1]

My second difficulty with this part of the Court's opinion is that in reality it overrules an aspect of a prior decision in this Court, *Automatic Radio Co.* v. *Hazeltine Research, Inc.*, 339 U. S. 827 (1950), without offering more than a shadow of a reason in law or economics for departing from that earlier ruling. Despite the Court's efforts to distinguish *Automatic Radio*, it cannot be denied that the Court there sustained a Hazeltine patent license of precisely the same tenor as the one involved here, on the ground that "[t]his royalty provision does not create another monopoly; it creates no restraint of competition beyond the legitimate grant of the patent." 339 U. S., at 83.

In finding significance for present purposes in some of the qualifying language in *Automatic Radio*, I believe that the Court today has misconstrued that opinion. A reading of the opinion as a whole satisfies me that the *Automatic Radio* Court did not consider it relevant

1. I find it unnecessary to consider the further question whether inclusion of such a provision should be held to violate the antitrust laws.

whether Hazeltine Research had "insisted" upon inclusion of the disputed provision, and that in emphasizing that the royalty terms had no "inherent" tendency to extend the patent monopoly and were not a *"per se"* misuse of patents, the Court was simply endeavoring to distinguish prior decisions in which patent misuse was found when the patent monopoly had been employed to "create *another* monopoly or restraint of competition." 339 U. S., at 832. (Emphasis added.)[2] Until now no subsequent decision has in any way impaired this aspect of *Automatic Radio*.[3]

Since the Court's decision finds little if any support in the prior case law, one would expect from the Court an exposition of economic reasons for doing away with the *Automatic Radio* doctrine. However, the nearest thing to an economic rationale is the Court's declaration that:

> "just as the patent's leverage may not be used to extract from the licensee a commitment to purchase, use, or sell other products according to the desires of the patentee, neither can that leverage be used to garner as royalties a percentage share of the licensee's receipts from sales of other products; in either case, the patentee seeks to extend the monopoly of his patent to derive a benefit not attributable to use of the patent's teachings." *Ante*, at 33.

The Court then finds in the patentee a heretofore nonexistent right to "insist upon paying only for use and not on the basis of total sales . . . ." *Ante*, at 36.

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2. The *Automatic Radio* Court explicitly distinguished a number of cases of that kind, including *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364 (1948), and *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661 (1944). See 339 U. S., at 832-833.

3. *Brulotte* v. *Thys Co.*, 379 U. S. 29 (1964), involved a different question: whether a royalty based solely upon use of the invention could be collected for use occurring after the patent's expiration.

What the Court does not undertake to explain is *how* insistence upon a percentage-of-sales royalty enables a patentee to obtain an economic "benefit not attributable to the use of the patent's teachings," thereby involving himself in patent misuse. For it must be remembered that all the patentee has to license is the right to use his patent. It is solely for that right that a percentage-of-sales royalty is paid, and it is not apparent from the Court's opinion why this method of determining the *amount* of the royalty should be any less permissible than the other alternatives, whether or not it is "insisted" upon by the patentee.

One possible explanation for the Court's result, which seems especially likely in view of the Court's exception for cases where the provision was included for the "convenience" of both parties, is a desire to protect licensees against overreaching. But the Court does not cite, and the parties have not presented, any evidence that licensees as a class need such protection.[4] Moreover, the Court does not explain why a royalty based simply upon use could not be equally overreaching.

Another possible justification for the Court's result might be that a royalty based directly upon use of the patent will tend to spur the licensee to "invent around" the patent or otherwise acquire a substitute which costs less, while a percentage-of-sales royalty can have no such effect because of the licensee's knowledge that he must pay the royalty regardless of actual patent use. No hint of such a rationale appears in the Court's opinion. Moreover, under this theory a percentage-of-sales royalty would be objectionable largely because of resulting damage to the rest of the economy, through less efficient allocation of resources, rather than because of possible

4. Cf. *American Photocopy Equip. Co.* v. *Rovico*, 359 F. 2d 745 (1966).

harm to the licensee. Hence, the theory might not admit of the Court's exception for provisions included for the "convenience" of both parties.

Because of its failure to explain the reasons for the result reached in Part III, the Court's opinion is of little assistance in answering the question which I consider to be the crux of this part of the case: whether percentage-of-sales royalty provisions should be held without exception to constitute patent misuse. A recent economic analysis[5] argues that such provisions may have two undesirable consequences. First, as has already been noted, employment of such provisions may tend to reduce the licensee's incentive to substitute other, cheaper "inputs" for the patented item in producing an unpatented end-product. Failure of the licensee to substitute will, it is said, cause the price of the end-product to be higher and its output lower than would be the case if substitution had occurred.[6] Second, it is suggested that under certain conditions a percentage-of-sales royalty arrangement may enable the patentee to garner for himself elements of profit, above the norm for the industry or economy, which are properly attributable not to the licensee's use of the patent but to other factors which cause the licensee's situation to differ from one of "perfect competition," and that this cannot occur when royalties are based upon use.[7]

If accepted, this economic analysis would indicate that percentage-of-sales royalties should be entirely outlawed. However, so far as I have been able to find, there has as yet been little discussion of these matters either by lawyers or by economists. And I find scant illumination

5. Baxter, Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis, 76 Yale L. J. 267 (1966).

6. See *id.*, at 299-301, 302-306.

7. See *id.*, at 300-301, 302-306, 331-332.

on this score in the briefs and arguments of the parties in this case. The Court has pointed out both today and in *Automatic Radio* that percentage-of-sales royalties may be administratively advantageous for both patentee and licensee. In these circumstances, confronted, as I believe we are, with the choice of holding such royalty provisions either valid or invalid across the board, I would, as an individual member of the Court, adhere for the present to the rule of *Automatic Radio*.

SUPREME COURT OF THE UNITED STATES.

No. 49, October Term, 1968.

ZENITH RADIO CORPORATION,

Petitioner,

v.

HAZELTINE RESEARCH, INC., ET AL.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

THIS CAUSE came on to be heard on the transcript of the record from the United States Court of Appeals for the Seventh Circuit, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals in this cause be, and the same is hereby, affirmed in part and reversed in part, with one half of the total costs to be taxed the respondents therein; and that this cause be, and the same is hereby, remanded to the

United States Court of Appeals for the Seventh Circuit for further proceedings in conformity with the opinion of this Court.

It is further ordered that the said petitioner, Zenith Radio Corporation, recover from the Hazeltine Research, Inc., et al. Twenty-three Thousand One Hundred and Eighty-one Dollars and Twenty-eight Cents ($23,181.28) for their costs herein expended.

May 19, 1969

Clerk's costs	$ 150.00
Printing of record ...	46,212.55
Total	$46,362.55

A true copy

Test:

/s/ JOHN F. DAVIS,

Clerk of the Supreme Court of the United States.

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit.

HAZELTINE RESEARCH, INC., *Appellant,* *vs.* ZENITH RADIO CORPORATION, *Appellee.*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 15246 No. 15563

MOTION TO DISQUALIFY JUDGE WALTER J. CUMMINGS, JR. FROM FURTHER PARTICIPATION IN ANY HEARING IN THIS COURT IN THIS CASE.

Now comes Zenith Radio Corporation, Appellee herein, by Thomas C. McConnell, its counsel and asks that Judge Walter J. Cummings, Jr. disqualify himself from any further participation in this case and for cause shows:

(1) That one of the issues sought to be raised by Hazeltine Research, Inc., Appellant, in further hearings in this cause is the effect of a certain release executed with others by Western Electric Co., a subsidiary of American Telephone and Telegraph Company, the appellant claiming that such release acts to release Hazeltine Research, Inc. as a conspirator with the Western Electric Company from liability from acts occurring prior to the execution of such release. That in making this contention, Hazeltine Research, Inc. is compelled to and does allege that it was a co-

conspirator with the Western Electric Company in the conspiracy which the Supreme Court of the United States has now held to be an illegal conspiracy violating Sections 1 and 2 of the Sherman Act.

(2) That at the time the said release was executed, Judge Walter J. Cummings, Jr. was attorney for the Western Electric Company and was actively engaged in defending that company now claimed to be the appellant's co-conspirator and was appearing continuously in court and making arguments in defense of his client's position that the conspiracy was legal under the antitrust laws. That one of the issues sought to be re-asserted here by Hazeltine Research, Inc. is the legality of the selfsame conspiracy held illegal by the Supreme Court.

(3) That the record in this case at p. 2129 of the Appendix, being plaintiff's exhibit No. 43 and as shown by the signature of Judge Cummings on appellee's exhibit No. 43 (A2129) shows that said Judge was then attorney of record for the Western Electric Company and signed the stipulation dismissing the cause of Zenith's counterclaim on behalf of Western Electric and therefore consummated a settlement of the cause for a consideration of some $10,000,000.

(4) That at the time of the said settlement and at the time the counterclaim was dismissed pursuant to the stipulation, the said Walter J. Cummings, Jr. told Thomas C. McConnell, then and now attorney for Zenith Radio Corporation, that he, Cummings, as its lawyer, had advised the Western Electric Company, a subsidiary of the telephone company, not to make a settlement because in his opinion Zenith could not prove its damages. That this is exactly the position which was taken by this Court in the above-entitled cause in the hearing of which Judge Cummings was a member of the panel and which panel held that

Zenith had shown no "fact of damage," that opinion being now reversed by the Supreme Court of the United States.

(5) That the fact that Judge Cummings participated as attorney, actively engaged in the litigation and not a mere attorney of record is shown by the transcripts of the proceedings which were filed as a part of the record in the United States District Court in Cause No. 48 C 1818 and of which Zenith has copies and can produce them for the inspection of this Court if the Court so requests.

(6) That since the same issues raised in that case are being raised here by Hazeltine Research, Inc., a co-conspirator with the Western Electric Company, Zenith may be forced to argue issues before a judge who appeared in an antagonistic position to Zenith and its attorneys and opposed each and every contention made by Zenith in that case which contentions involved the same illegal conspiracy and its effect on Zenith's Canadian business at an earlier period than here involved.

(7) That the reason Judge Cummings was not requested to disqualify himself at the time this case was originally heard was that Zenith's counsel had no knowledge, prior to the actual appearance on the bench of Judge Cummings, that he was going to participate as a judge in the case. That Zenith's counsel was present, prepared to argue the case and had no opportunity of consulting with his client so that he might have authority to make a motion of the kind and character presented here; that in view of the facts here presented Judge Cummings has the legal and ethical duty to recuse himself regardless of whether Zenith or its counsel makes a motion to that effect.

WHEREFORE, in the interests of justice and pursuant to the principles set forth in *Roberson* v. *United States*, 249 F. 2d 737 at p. 741 a situation is presented "under which a judge should have disqualified himself" and therefore

appellee Zenith Radio Corporation requests that Judge Walter J. Cummings, Jr. now disqualify himself from any further participation in this case.

ZENITH RADIO CORPORATION,
Appellee,
By THOMAS C. MCCONNELL,
Its Attorney.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

Thomas C. McConnell, being duly sworn on oath says that he has read and subscribed to the foregoing motion and that the facts therein stated are true.

THOMAS C. MCCONNELL.

Subscribed and sworn to before me, a Notary Public in and for the State and County aforesaid this 20th day of June, 1969.

STEPHANIE A. CHODERA,
Notary Public.

UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

Chicago, Illinois 60604.

June 30, 1969

Before

Hon. Latham Castle, Chief Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge

HAZELTINE RESEARCH, INC., and HAZELTINE CORPORATION,
Appellants,
Nos. 15246, 15247, 15563, 15564,
vs.
ZENITH RADIO CORPORATION,
Appellee.

} Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

ORDER.

This cause has come on to be heard upon the motion of Hazeltine Corporation for issuance of this court's mandate vacating the district court judgment against it, pursuant to the Supreme Court affirmance of that part of this court's judgment in the above cause; upon the motion of Hazeltine Research, Inc. for leave to file supplemental briefs and schedule oral argument on the issues remaining undecided in this court, and Zenith Radio Corporation's answer there-

to; upon Zenith's motion to disqualify Judge Cummings from further participation in this case; and upon the motion of Hazeltine Research for extension of time to respond to Zenith's motion and answer.

And this court being fully advised by the motions and answer, IT IS ORDERED that the Hazeltine Corporation motion for issuance of mandate be and it is hereby allowed; that the Hazeltine Research, Inc. motion for scheduling of supplemental briefs and oral arguments be and it is hereby denied; however, both parties, before September 1, 1969, may call to the court's attention any supplemental authorities with respect to the matters still before this court; that the Zenith motion to disqualify Judge Cummings is denied and the motion of Hazeltine Research for an extension of time to respond to that motion is denied; that the motion of Hazeltine Research for extension of time to respond to the answer of Zenith is allowed, to July 15, 1969, with respect only to paragraph 4 of said motion.

IN THE UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

September Term, 1969 — September Session, 1969

Nos. 15246, 15563

HAZELTINE RESEARCH, INC.,
Plaintiff and Counter-Defendant, Appellant,
vs.
ZENITH RADIO CORPORATION,
Defendant and Counter-Claimant, Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

October 27, 1969

Before CASTLE, *Chief Judge,* KILEY and CUMMINGS, *Circuit Judges.*

KILEY, *Circuit Judge.* This court, on December 19, 1967, filed its decision, 388 F. 2d 25 (7th Cir. 1967), in the above causes and, so far as pertinent now, affirmed the judgment awarding $150,000, treble damages, to Zenith Radio Corporation for misuse by Hazeltine Research, Inc. (HRI) of its domestic patents, but struck paragraph A of the related injunction, issued to restrain HRI from imposing unlawful conditions on those patents. We reversed the judgment in Zenith's favor for $38,000,000, treble damages, based on HRI's unlawful participation in the Canadian, English and Australian patents pools, and *ipso facto* set aside an injunction restraining HRI's further unlawful antitrust activity in these foreign patent pools.

On appeal to the Supreme Court, the treble damage award with respect to the domestic patents was not challenged. The Court, 395 U. S. 100 (1968), reversed our decision striking paragraph A of the injunction and remanded that part to this court for further consideration. *The Court also reversed our decision setting aside the award of damages flowing from the unlawful activity of the Canadian pool and remanded that issue to us to consider the effect of HRI's affirmative release and statute of limitations defenses on the award.* In addition, the Court reinstated the related injunction which this court had set aside with that treble damage judgment for Zenith.[1] The Supreme Court reversed our decision with respect *to the Canadian patent pool because it concluded we erred in our determination that Zenith had failed to prove the "fact" of damage in Canada.*

After the Supreme Court mandate was filed in this court, we gave leave to HRI and Zenith to file supplemental authorities. Zenith thereupon "abandon[ed] its request" originally made in this court to reinstate paragraph A which this court had struck. The following questions are before us: (1) whether Zenith's injury during the statutory damage period resulted to any extent from HRI's conduct preceding that period and, if so, what effect releases given by Zenith in 1957 had on Zenith's recovery; (2) what effect the statute of limitations had on HRI's liability; and (3) whether the award of damages was excessive. *These points had been raised before us by HRI in the first appeal, but we saw no need of passing on them in view of our reversal of the judgment for Zenith.*

We have examined the issues now before us in the light

1. The Supreme Court affirmed this court's decision vacating judgments in Zenith's favor against Hazeltine Corporation. It affirmed our decision with respect to setting aside the treble damage judgment so far as it was based on the patent pool activities in England and Australia.

of the Supreme Court opinion and the supplemental authorities cited to us. We vacate the judgment for Zenith with respect to the Canadian pool in the amount of $6,297,391, trebled, and remand for further proceedings with respect to the award of damages.

THE AFFIRMATIVE DEFENSES.

After the evidence at the trial was closed HRI moved for leave to file the affirmative defenses in bar of Zenith's recovery. *Zenith's counsel objected to the filing of the defenses on the ground that they came too late and were waived.* The district court, however, permitted the defenses to be filed and thereafter denied HRI's motion for judgment based on the defenses. The Supreme Court noted that the district court's refusal to disturb the findings it had already made with respect to the Canadian pool *was a rejection of the defenses either on the merits or on the ground that the defenses had been waived under Fed. R. Civ. P. 12(h). 395 U. S. 100, 117, n. 13. It is our view that the court's ruling was not on the basis of waiver, but because the defenses on their merits did not bar Zenith's recovery.* We turn therefore to consideration of the correctness of the district court's ruling.

The relevant four year damage period was measured from May 22, 1963, when Zenith filed its counterclaim.[2] The cutoff date therefore was May 22, 1959. HRI relies upon releases given September 27, 1957, by Zenith to RCA, General Electric, and Western Electric in settlement of Zenith's counterclaim in the case of *RCA* v. *The Rauland Corp. and Zenith Radio Corp.*, No. 48 C 1818 (N. D. Ill. 1957), in contending that Zenith's claim is now barred.

2. See 395 U. S. 100, 108 (1968). 15 U. S. C. § 15b reads:

> Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.

The Supreme Court in noting that the district court did not date the events as occurring before or after the May 22, 1959 start of the damage period, said "[t]he damage award was confined to *injuries* sustained during the damage period, but the trial court apparently deemed it immaterial whether the damage-causing acts occurred before or after the start of the damage period." 395 U. S. 100, 116 (1968). Damages were awarded, the Court said, on the assumption that were it not for the conspiracy, Zenith would have had sixteen per cent of the Canadian market instead of its actual three per cent on May 22, 1959 and throughout the damage period. The Court then stated that since the district court attributed the deficient share on May 22, 1959 to the conduct of the pool, that conduct necessarily preceded the deficiency, and therefore pre-damage period conduct necessarily resulted in some part of the damages awarded.

Since HRI was an unnamed joint tortfeasor, as admitted by Zenith at trial, with its co-conspirators in the Canadian pool who were named in the *Rauland* case, and Zenith did not reserve its right against HRI, the releases given by Zenith clearly barred recovery from HRI of past, present and *future damages* flowing from any misconduct of HRI prior to the dates of the releases. *Twentieth Century-Fox Film Corp.* v. *Winchester Drive-In Theatre,* 351 F. 2d 925, 931 (9th Cir. 1965), *cert, denied,* 382 U. S. 1011 (1966); *Dura Electric Lamp Co.* v. *Westinghouse Electric Corp.,* 249 F. 2d 5 (3r Cir. 1957). Our inquiry there is narrowed to the question of the effect of the statute of limitations on Zenith's right of recovery for post-release misconduct.

It is "well settled . . . that no civil action lies for a conspiracy unless there be an overt act that results in damage to the plaintiff." *Nalle* v. *Oyster,* 230 U. S. 165, 182 (1913). Consequently, in the case before us the mere existence of the conspiracy following the 1957 releases does not itself give rise to Zenith's cause of action. The law with respect

to the statute of limitations in Sec. 15b of the Clayton Act is that the period commences to run from the last overt act of the conspiracy. *Crummer Co.* v. *DuPont*, 223 F. 2d 238, 247-48 (5th Cir.), *cert. denied*, 350 U. S. 848 (1955); *Momand* v. *Universal Film Exchange*, 43 F. Supp. 996, 1007 (D. Mass. 1942), *aff'd* 172 F. 2d 37, 47 (1948); *Steiner* v. *Twentieth Century-Fox Film Corp.*, 232 F. 2d 190, 194 (9th Cir. 1956); *Century Hardware Corp.* v. *Powernail Co.*, 282 F. Supp. 223, 227 (E. D. Wis. 1968). In *Century Hardware*, the district court construed this court's decisions in *Emich Motor Co.* v. *General Motors Corp.*, 229 F. 2d 714 (7th Cir. 1956), and *Baldwin* v. *Loew's, Inc.*, 312 F. 2d 387 (7th Cir. 1963), as stating the law of this Circuit to be in accordance with the foregoing decisions.

In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 377 F. 2d 776 (3rd Cir. 1967) (supplemental opinion at 793-95), the following rule was applied:

> [W]here the repeated and measurable invasion of a plaintiff's rights occurs both outside the statutory period and also within it, the fact that some of the injury and change occurred outside the statutory period does not affect the plaintiff's right to recover for the separative invasion of its rights which occurred within the period.

The rule as applied in that case was approved by the Supreme Court on appeal of the *Hanover* case. See 392 U. S. 481, 502 n. 15 (1968). Thus, even though Zenith may have had a cause of action for overt acts of the conspiracy prior to May 22, 1959—the beginning of the damage period —*the fact that it did not then file suit does not preclude its present suit for damages suffered within the damage period as a result of an overt act repetitious of the unlawful pre-period acts occurring in the damage period.*

HRI conceded at trial that the Canadian pools existed into the damage period. The record establishes that on

June 5, 1959, the Canadian pool wrote Zenith claiming that it was infringing pool patents by its distribution of American-made televisions and radios in Canada. This act was substantially similar to overt acts occurring in the pre-damage period. Accordingly, Zenith, claiming the right to recover for damages suffered only in the statutory period, is entitled to recover for the damages it suffered as a result of the June 5 injury.[3]

We conclude therefore that the district court's denial of *the motion to bar Zenith's recovery completely on the ground of the releases and the running of the statute of limitations was not erroneous.*

Excessiveness of the Award.

We think this issue is not now ripe for decision because HRI had no opportunity, after the district court permitted filing of HRI's affirmative defenses, to introduce evidence relevant to the affirmative defenses. We vacate the district court's award of $6,297,371—trebled to $18,892,173—and remand for further proceedings.

The measure of proof is the difference between the percentage share that Zenith actually enjoyed during the damage period and the percentage it would have had as a free competitor. There was testimony for Zenith, relied on by the district court, that in the four year damage period,

3. Zenith argued in its original brief that the statute of limitations was tolled by reason of Sec. 5(b) of the Clayton Act during the pendency of *United States* v. *General Electric, et al.* in the Southern District of New York from November 28, 1958 to November 1, 1963. At the trial Zenith did not raise this point in a reply to HRI's affirmative defense, so that, strictly speaking, the point is not properly before us. However, in any event, the law of this circuit is that the tolling of the limitation protects a plaintiff in a private antitrust suit only with respect to a party defendant in the government suit. *Sun Theatre Corp.* v. *RKO Radio Pictures,* 213 F. 2d 284, 292 (7th Cir. 1954). HRI was not a party defendant in that suit, although named as co-conspirator.

had Zenith been free from the unlawful activity of the Canadian pool which virtually excluded it from the Canadian market, *it would have enjoyed the same proportion of that market as it did in the United States market.* In Canada its principal competitors were counterparts of its principal competitors in the United States. Its promotion and advertising flowed back and forth between the two countries. Distributors in Canada were available, but were frightened off by the pool's activities and threats. *It is our view that this was competent evidence, prima facie, upon which the amount of damage could be reasonably approximated by virtue of the Supreme Court's decision in Bigelow* v. *RKO Radio Pictures,* 327 U. S. 251, 264-65 (1946).

The district court in permitting the filing of HRI's affirmative defenses of release and statute of limitations—as an amendment to HRI's defense to Zenith's counterclaim—*made it plain in doing so that the court would make no change in its findings and* conclusions with respect to *damage in the Canadian market.* However, we refer again to the statement of the Supreme Court that "[s]ome part of the damages awarded . . . *necessarily resulted from pre-damage period conduct.*" 395 U. S. 100, 116-17. The Court noted that although the damage award was confined to the damage period, the trial court apparently deemed it immaterial whether the "damage-causing" acts occurred before or after the start of the damage period.

Earlier in this opinion we held that the releases only barred Zenith's recovery of damages caused by injuries *inflicted prior to the date of the releases; that the damage period commenced to run from the last overt act of the conspiracy; and that the statute of limitations did not bar* recovery of damages *caused by "damage-causing" acts within the period.* Accordingly, we think that HRI should have—what it was not given at the trial—an opportunity to introduce testimony, in support of its defense of statute of

limitations, aimed at excluding from recovery damages flowing from pre-period "damage-causing" acts, as well as *an opportunity to introduce evidence to show that Zenith's damage flowing from "damage-causing" acts within the period did not amount to $6,297,391.*

The judgment for $6,297,391—before trebling—is vacated and the cause is remanded for further proceedings consistent with the views expressed in this opinion. (Italics ours.)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Monday, October 27, 1969.

Before
Hon. Latham Castle, Chief Judge.
Hon. Roger J. Kiley, Circuit Judge.
Hon. Walter J. Cummings, Circuit Judge.

No. 15246, 15563
HAZELTINE RESEARCH, INC.,
Plaintiff and Counter-Defendant-Appellant,
vs.
ZENITH RADIO CORPORATION,
Defendant and Counter-Claimant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, subsequent to the remandment to this Court by the Supreme Court of the United States for further proceedings in conformity with the opinion of said Court.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court for $6,297,391—before trebling—in this cause appealed from be, and the same is hereby, VACATED, and that this cause be, and it is hereby, REMANDED to the said District Court for further proceedings consistent with the views expressed in the opinion of this Court filed this day.

It is further ordered and adjudged that the costs of these appeals in this Court be divided equally between the parties.

IN THE UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

HAZELTINE RESEARCH, INC.,
Plaintiff and Counter-Defendant, Appellant,
v.
ZENITH RADIO CORPORATION,
Defendant and Counter-Claimant, Appellee.

Nos. 15246 and 15563

STIPULATION CONCERNING RECORD ON ZENITH'S PETITION FOR CERTIORARI.

Counsel for Zenith Radio Corporation and counsel for Hazeltine Research, Inc. agree that the following items in the record of the United States Court of Appeals for the Seventh Circuit in Docket Nos. 15246 and 15563, shall be certified to and filed with the Clerk of the Supreme Court of the United States:

1. The entire record which was certified to and filed in the Supreme Court pursuant to the stipulation of counsel dated March 6, 1968, filed in this Court and printed in Supreme Court appendix pages 4279-83, in No. 1266, October Term, 1967 (specifically excluding the materials excluded under said stipulation).

2. The entire record in said Court of Appeals in Docket Nos. 15246 and 15563, subsequent to the opinion of the Supreme Court of May 19, 1969, including but not by way of limitation, the mandate of the Supreme Court, all mo-

tions, answers, briefs, memoranda, supplemental authorities and other papers filed by Hazeltine Research, Inc. or Zenith Radio Corporation, and all orders of said Court of Appeals and its opinion and judgment of October 27, 1969.

Dated this 23rd day of March, 1970.

/s/ THOMAS C. MCCONNELL,
Thomas C. McConnell,
Attorney for Petitioner Zenith Radio Corporation,
134 South La Salle Street,
Chicago, Illinois 60603,
RAndolph 6-9131.

/s/ VICTOR P. KAYSER,
Attorney for Respondent Hazeltine Research, Inc.,
135 South La Salle Street,
Chicago, Illinois 60603,
RAndolph 6-2545.

IN THE UNITED STATES DISTRICT COURT.
* * (Caption—59-C-1847) * *

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Hon. Richard B. Austin, one of the judges of said court, in his courtroom in the United States Courthouse at Chicago, Illinois, on Tuesday, March 30, 1965, at the hour of 2:00 o'clock p.m.

Present:

Mr. Victor P. Kayser, Mr. Hudson Rathburn, and Mr. C. Lee Cook, Jr., on behalf of the plaintiff;

Mr. Thomas C. McConnell, Mr. Philip J. Curtis, and Mr. Francis W. Crotty, on behalf of the defendant.

Of Counsel for Defendant: Mr. Dugald S. McDougall.

[2] The Clerk: 59 C 1847, Hazeltine v. Zenith, hearing.

Mr. Kayser: Hazeltine is ready, your Honor.

The Court: You have the laboring oar.

Are you ready, Mr. McConnell?

Mr. McConnell: We are ready, your Honor.

The Court: You may proceed.

Mr. Kayser: Your Honor, I would first—

The Court: Let me say that there will be no restrictions on anything that anybody wants to say. I mean, you are not restricted to today or tomorrow or the next day, which may make some people in the courtroom happy.

Mr. Kayser: Well, your Honor, at the outset I would like to answer a question which you asked last Friday and, namely, that was whether John Chadwell will be here to argue this.

The Court: I don't see him.

Mr. Kayser: You are quite correct, your Honor, he is not here. But I want to give an explanation, nevertheless.

The Court: I am sure you can get along all right in his absence.

Mr. Kayser: Well, your Honor, if I may, I would [3] like to explain the circumstances.

The Court: All right.

Mr. Kayser: Because he was the lawyer who came before you in February and asked for the time.

The Court: Yes.

Mr. Kayser: And I am the second man on the case, so if I may, I would like to state briefly—

The Court: All right.

Mr. Kayser: When he asked for the time to examine into the case, he assumed that the trial that he was then involved in would end in about three weeks, but as so often is the case, it went on and on and still is going on, and the present forecast is that it will not finish until the middle of April.

Now, the case is not on trial this week. I want to make that clear. They are working with their trial preparation. But even if Mr. Chadwell were here today, and by reason of the fact that although he has been in touch with what we have done here and heartily agrees with it, he could not possibly have been in a position to argue the case. He asked me to express his regrets to the court and to say that if by any chance the court wanted to put it over until May, [4] he would be eager to make the argument, but in the meantime—

The Court: I am not that eager.

Mr. Kayser: Yes, your Honor.

Well, I am here, then, ready to argue in his place and stead, and I guess I will just have to play David to Mr. McConnell's Goliath.

Well, now, to the case and our part in it: When we were retained—

The Court: I assume that you perhaps are going to divide this up between the misuse issue and the antitrust issue.

Mr. Kayser: Yes, your Honor, I will talk about the antitrust counterclaim first and at greatest length and then touch more briefly on our misuse motion.

The Court: As I understand it, there is no contention in regard to the misuse that there was any subterfuge or laying in the weeds and surprising people in court.

Mr. Kayser: That is right, your Honor.

The Court: That applies only to the counterclaim.

Mr. Kayser: On the misuse there is no such contention.

The Court: All right.

[5] Mr. Kayser: Well, now, when we were retained as additional counsel in this case back in February, all we knew was that we suddenly had a client who told us that—

The Court: Who needed a lawyer.

Mr. Kayser:—who needed a lawyer, needed another lawyer. They had filed a patent suit, been greeted with a misuse defense, and some years later were greeted with an antitrust counterclaim which looked to them and to their counsel as being primarily a make-way pleading, and the next thing they knew they were faced with the possibility of a judgment of some over $48,000,000 which was —I believe is probably the largest known at least in antitrust treble damage annals and is some ten to fifteen times their net worth; so I think it is understandable why they were alarmed.

[6] Well, now, when we got the time from this Court to analyze this case, we of course began immediately with a very concerted analysis and study. And one of the things that we analyzed, and analyzed in part, was the Exhibit, Defendant's Exhibit 218, this document on which all of this claim of damages is based.

We checked into enough to realize that there was some

might strange things in that Exhibit. We understood why Mr. Dodds was confused by it, because we couldn't figure it out. So we got Ernst & Ernst in, the accountants, and they made an analysis of Exhibit 218, and that's a later part of my discussion.

But I must say that when you look at that Exhibit 218, a bunch of longhand papers that are not even legible—they weren't even typed to bring into Court—I think this is probably the sorriest group of documents that 48 million dollars has ever been based on.

But now getting back to our part in the case, as we proceeded with our examination, we found some—gradually [7] found some very startling and significant things. As we looked into this thing, it gradually dawned on us, your Honor—

The Court: You are now addressing yourself to the question of damages?

Mr. Kayser: No, your Honor. I say I will go to the question of damages later. I just want to explain that Ernst & Ernst had been drawn into the case because we couldn't figure out that Exhibit.

The Court: All right. I see.

Mr. Kayser: And I am now back to where we did our own work without Ernst & Ernst accounting help. But the thing that came to light gradually was the fact that the cause of action which was embodied in these findings and conclusions wasn't even a cause of action which was in the counter-claim. And the cause of action which was in the findings was a cause of action which, if it had been pleaded, would have called for a great deal more discovery; it would have resulted obviously in the filing of the affirmative defenses or release of joint tortfeasors and the statute of limitations.

The Court: Are you saying now that you couldn't de-

termine from this counter-claim what the plaintiff's [8] counter-claim embraced?

Mr. Kayser: No, that is not true, your Honor. The counter-claim as pleaded we could understand, but we discovered that the evidence did not relate to this counter-claim but to another theory which appears for the first time, actually, in the findings.

The Court: Doesn't the counter-claim relate to the inability to export to these countries American made products?

Mr. Kayser: It relates to that subject, your Honor—

The Court: Isn't that clear in the counter-claim?

Mr. Kayser: No. That is clear, but it is also clear, your Honor, that the cause of action for damages which was pleaded there was the claim that, by reason of the acts of Hazeltine in filing the patent suit, plus the alleged infringement threats—that by reason of those acts, those were the proximate cause by the reason of those acts, Zenith's ability to expand—nothing more; ability to expand in these three countries and, they say, and other countries had been interfered with.

[9] The Court: I mean, is it your theory that they proved up something that wasn't in the pleadings? Is that it?

Mr. Kayser: Yes, your Honor. That is exactly our theory.

As a matter of fact, we have taken occasion to put here on a chart a comparison, a comparison of what is—and this, incidentally, is reproduced from page 26, I believe, of our memorandum, a comparison of what it is that Zenith pleaded.

The Court: And that they proved up something else?

Mr. Kayser: And they proved up something entirely different, yes.

Both of them ask for treble damages.

The Court: There was once a time when one of the great con men of the country appealing his case said that he was indicted for a crime that hadn't occurred, tried for a crime for which he wasn't indicted, and convicted of a crime for which he wasn't tried. I mean, you don't go the three stages; you just go two.

Mr. Kayser: I'm afraid you lose me on the third one, your Honor.

[10] The Court: He was convicted of something for which he was not tried. I mean, you at least embrace that feature. You were found guilty of something for which you didn't think you were being tried.

Mr. Kayser: Or which the findings allege acts and allege facts of which we were not charged, of which we were not apprised in the pleadings.

The Court: I mean, you are right in line with the last one of the three things raised by this gentleman I am talking about.

Mr. Kayser: I'm sorry, your Honor. I don't know that case.

The Court: I know you don't.

Mr. Kayser: Well, this basically is what we found. These are matters, your Honor, which admittedly were not called to your attention, and which were not before your Honor when he entered his findings and conclusions. And it was for that reason that we filed the motion to set aside the antitrust findings which I am here to discuss today.

Now—

The Court: What in your opinion was the issue in regard to the antitrust pleadings?

Mr. Kayser: The issue in the pleading?

[11] The Court: Yes.

Mr. Kayser: The issue in the pleading was whether or not the acts of Hazeltine in bringing this patent suit plus the alleged charges of infringement in connection—

The Court: I mean, the issue in regard to the antitrust aspect. What was the issue that you were charged with, in your opinion?

Mr. Kayser: We were charged with the issue as to whether or not those two acts in fact have interfered with Zenith's ability to expand its foreign trade in these three countries.

Now, your Honor, you may say, well, that doesn't make much sense. The fact is we didn't think and we don't think it makes much sense. But that was what was pleaded.

The Court: Are you the first ones that became aware of that?

Mr. Kayser: Pardon?

The Court: Are you, in your opinion, the first ones that became aware of that?

Mr. Kayser: I believe that's probably a fair statement.

The Court: I mean, you wouldn't say that this was [12] the issue in regard to that. Has Hazeltine Corporation conspired with companies domiciled in Canada, Great Britain, and Australia, but not operating within the United States, with intent and effect of restricting the export of receivers from the United States into their respective countries—that would not be your definition of what the issue was?

Mr. Kayser: No, your Honor. The issue is, as stated in paragraph 9—

The Court: That, of course, was the definition of the issue by Hazeltine's counsel ninety days after all the proof was in.

Mr. Kayser: Sir?

The Court: And I refer you to page 8 of plaintiff's post trial brief.

Mr. Kayser: Yes.

[13] The Court: And that is Hazeltine's counsel's definition of the issue 90 days after the proofs are closed.

Mr. Kayser: You are referring to which—

The Court: Column 2, page 8. And it starts: "There are only two basic issues before the Court for decision." The first one, of course, has to do with the misuse. Number 2 is the one that has to do with the counter-claim.

Mr. Kayser: Yes.

The Court: And he goes on to say that, "If Hazeltine had done these things, prevented the export of television receivers from the United States, this might under appropriate circumstances constitute a violation of the anti-trust laws."

Do you differ with counsel's statement, your prior counsel's statement 90 days after proofs were closed?

Mr. Kayser: As to what the issues were that were presented in this case, yes, your Honor, I do. I most definitely do.

The Court: Of course, you know by now that this is a new theory on your behalf.

[14] Mr. Kayser: Your Honor, I don't think it is a new theory. I think that—

The Court: I mean, at least it wasn't advanced in this brief filed June 8, 90 days after the proofs closed.

Mr. Kayser: Your Honor, we fully recognize the fact that the trial counsel did not realize what was happening to him. We fully realize that fact. If we had realized it—

The Court: I mean, he didn't even realize it 90 days after the proofs were over.

Mr. Kayser: Yes, your Honor. I quite agree.

The Court: How many Hazeltine cases has that trial counsel tried in the Courts of the United States throughout the country, or do you have any knowledge?

Mr. Kayser: He has tried a great many Hazeltine cases, your Honor, but he has not tried any anti-trust cases, and he has not tried any antitrust cases under these—particularly under these circumstances. Yes, he has been involved

in antitrust litigation, but he is a patent man; he is a patent man.

[15] Let me say, if I may, a comment or two on that because I can just anticipate some comments we might otherwise expect from Mr. McConnell here.

The Court: Don't anticipate it to the extent that he doesn't say it.

Mr. Kayser: Well, possibly if I do anticipate, I will save him the trouble.

The Court: I don't believe that will work.

Mr. Kayser: Well, your Honor, I think, is better qualified to answer that than I.

Your Honor, the fact of the matter is this: As concerns Mr. Dodds, he probably has as fine a record in the trial of patent cases as any man of the patent bar today. There isn't any question about it. He is a patent trial lawyer. But Mr. Dodds tries cases normally under particular circumstances involving other patent lawyers who are, you might call them, sort of a gentleman's club. If one of them says to another, "I'm going to rely on this prior art," he knows that is the fact. He doesn't check into it. He knows that that is what it is going to be. If one says to another—the plaintiff to the defendant, that "I propose [16] to charge you with infringement of claim No. 3 in a patent," he knows that is the fact, and he proceeds accordingly, and he gives it no more thought.

[17] The Court: There was some other fine names on this brief of June 8.

Mr. Kayser: Yes; yes.

The Court: And some that are considered knowledgeable in the field that you are talking about.

Mr. Kayser: As a matter of fact, as you know, Mr. Dodds was the man that tried the case.

The Court: I understand. But I don't know whether they are misleading the court by putting these other names

on the brief, and I am referring to page 8 of that brief that has these other names on it.

Mr. Kayser: Your Honor realizes, of course—you were here—who actually tried the case. It was Mr. Dodds.

As I was going to say, Mr. Dodds is not used to being faced with a type of situation where, without as much as a "by your leave," or without request to amend a pleadings, without any notice, he suddenly is faced with an entirely different set of proof.

Now, I suppose your question is, how could this possibly happen.

Well, I think I can explain how it happened.

[18] The Court: I think that the pretrial briefs show that he wasn't suddenly confronted with this, because the pretrial briefs filed many months before trial indicated to Mr. Dodds what the theory of the cross-complainant was.

Mr. Kayser: I fail to see anywhere the theory shown in the right column as being in the findings. I fail to find that in Mr. McConnell's—either in his pretrial brief or in his opening statement. And I would very much like your Honor, if you could, to point out where it is. I would like to see it, because I haven't been able to find it.

The Court: Maybe I might be shutting off Mr. McConnell. I don't want to do that. So if he doesn't, I will supply you with the page numbers in his pretrial brief.

Mr. Kayser: All right.

Well, now, I think I have stated our position as concerns—

The Court: Do you care to point out these differences here?

Mr. Kayser: Yes, your Honor.

As I say, in the counterclaim which was pleaded, we find that the combination of the two acts, the pendency [19] of the infringement—not the filing of it; he admitted that the filing of it gave him no cause of action. The pendency of

it plus the alleged charges of infringement on the hundreds and hundreds of patents which this Hazeltine Corporation had interfered with his ability to expand. He claimed only a period of damage from October 18, '61, to May 22, '63.

Now, he did not do so expressly, but this is necessarily and inescapably involved in his pleading.

The Court: Would you explain that to me.

Mr. Kayser: Yes. Because, to begin with, in the affidavit which Mr. Crotty signed when this counterclaim was first presented, or rather was first noticed on Hazeltine, and in the motion which was signed by Mr. McConnell and by Mr. Curtis, it was stated first that the cause of action did not exist when the answer to the patent suit had been filed.

Now, the answer in the patent suit was filed in April, 1960.

The Court: And that is how you arrived at that number?

Mr. Kayser: Yes. And the only other act which is [20] alleged here is the cumulative act of charging infringement, and the testimony of Mr. Crotty—of Mr. Ruestow of the Hazeltine parent, and the letter which Mr. Crotty himself wrote identifies the first meeting on that subject specifically as October 18, 1961.

The Court: Are you saying to me now that in regard—as included in the finding, that that is not contained in the pleadings—the alleged restrictive practices?

Mr. Kayser: Here?

The Court: No. (a) on column 2.

Mr. Kayser: Yes.

The Court: That is not included—

Mr. Kayser: This is not alleged as an act causing damage, no, sir. It is not. As a matter of fact, if it had been, then the affidavit filed and the motion filed would have been false. It would have been false because these acts—the acts which are in the findings go back over many years.

[21] Your Honor, these acts under (a), the proximate cause of damage, could not have been in that counterclaim and have an honest, true pleading. Their affidavit would not have been truthful.

The Court: Have you read paragraph 4 of the counterclaim—

Mr. Kayser: Yes, your Honor, I have.

The Court: That clearly sets forth that their complaint has to do with their—

Mr. Kayser: Yes, it does, your Honor. It says that the complaint has to do that, but that is not alleged as the acts causing the damage. Sure, in the trial—and this is one of the reasons that Mr. Dodds was so confused as to the exact theory. He was entrapped because, day after day, we heard about all of this background material about this well documented international conspiracy. And I—the record—the error was blue with this. But this, under the theory of the action as pleaded, was merely background. These were not the alleged acts which are claimed to have caused the damage.

[22] The Court: You may proceed.

Mr. Kayser: All right. Now, your Honor, I submit that as this case has developed, that your Honor would be perfectly justified under the Park and Tilford case which is in our brief to dismiss the action, to dismiss the counterclaim completely. As a matter of fact, Mr. McConnell, during the trial, in effect admitted the counterclaim as pleaded right out of Court.

The Court: Are you later on going to get down to this overt act theory of yours?

Mr. Kayser: You mean as concerns—

The Court: The theory of damages.

Mr. Kayser: Yes, yes.

The Court: I don't want to get you off the track. I want to follow your—

Mr. Kayser: Your Honor, it is my job to answer any questions or try to answer any questions you have. That is my first job.

The Court: I mean, if you don't get to it, I am going to ask you about it.

Mr. Kayser: We will. I'm just pointing out, actually, Mr. McConnell has admitted his counterclaim as [23] pleaded right out of Court. Because your Honor may recall at one time during the trial, when he was examining Mr. Crotty about all this correspondence having to do with a license negotiation, that at page 622 of the record, Mr. McConnell showed him a letter of May 20, 1963 in this course of correspondence from Mr. Ruestow to Mr. Crotty, and you asked, "This I assume is all offered under the misuse theory."

"Mr. McConnell: Correct. It didn't have anything to do with the overall conspiracy."

So their affidavits, when they filed their original counterclaim, admitted that the pendency of the infringement suit was not an act of causing damage. Mr. McConnell admits that the evidence having to do with negotiations or licenses later on have nothing to do with the conspiracy.

So, really, the counter-claim as pleaded—they have admitted that they have no cause of action on that. And if your Honor noticed that Park and Tilford case, the Seventh Circuit said there, when exactly the same procedure was tried, only more openly, to plead one cause of action [24] and to prove another, and Mr. McConnell asked leave to amend, to prove—originally to charge the new cause of action, the trial court said, "You can't do it; you are prejudicing the defendant."

He went ahead and put in his proof anyhow, and he tried to again amend, and the District Court here said, you can't do it, dismissed the counterclaim as pleaded, and the Seventh Circuit affirmed.

I say, your Honor, you would be entirely justified on this record in doing the same thing here.

[25] The Court: I think the thing for you to do is try and convince me that the proximate cause of the injury, which are in the findings, weren't alleged in the counterclaim.

Mr. Kayser: Weren't alleged as the cause of injury?

The Court: Yes. Would you care to try to do that?

Mr. Kayser: Yes, your Honor. If that is the sole problem in your mind, whether or not—

The Court: That is one of the problems in my mind. In this case there can't be a sole problem.

Mr. Kayser: Yes, I am afraid you are right.

The Court: I mean, with the hundreds of pages of material that you have filed in the past week, there can't be a sole problem.

Mr. Kayser: Yes; yes.

But as concerns the question whether the alleged restrictive practices be pools, going back over many years, as the findings say so often, involving refusal to license imports and threats to sue infringers, whether or not those alleged acts are charged as the cause of damage—

The Court: You have my point.

Mr. Kayser: Yes, your Honor, and I think that [26] there is a perfectly clear answer to that in paragraph 9 of the counterclaim and in the affidavit and motion which were filed here by Mr. Crotty and Mr. McConnell.

I read from paragraph 9, which says:

> "The acts performed by counter-defendant and his co-conspirators, pursuant to the unlawful conspiracy alleged herein, were the direct and proximate cause of loss and damage to counter-claimant, which injury is continuing and includes—"

The Court: Stop at the semi-colon there.

Mr. Kayser: Yes.

The Court: Doesn't he say the unlawful conspiracy alleged therein, and isn't there prior to that reference to this restrictive practice in regard to imports?

Mr. Kayser: Yes, but he says—

The Court: And isn't that alleged to be the conspiracy?

Mr. Kayser: Those are not the acts alleged to cause the damage, your Honor. Those are not the acts on which [27] he is suing. Those are not the acts on which he is suing, because as I said before, if he were suing on those acts, his affidavit couldn't stand up.

But I would like to proceed and then get—

The Court: Let's get to this semantically.

[28] Mr. Kayser. All right.

The Court: Paragraph 9 says:

> "The acts performed by the counter-defendant and its co-conspirators pursuant to the unlawful conspiracy alleged herein were the direct and proximate cause of loss and damages to the counter-claimant, which injury is continuing and includes—"

That doesn't make the following A, B and C exclusive of all other things, does it?

Mr. Kayser: Possibly not by itself, your Honor, but I don't think that you can fragment either this paragraph of a pleading or the circumstances under which it was filed.

The Court. I am not trying to fragment it, I'm trying to keep it all together.

Mr. Kayser: Yes.

The Court: If the language permits it to be done.

Mr. Kayser. Yes.

But A and B have to do with this fifty thousand fifty odd dollars,—

The Court. That is right.

[29] Mr. Kayser: —and C is the one to which I am addressing myself here.

Then he says:

"Because of the pendency of this suit and counter-defendant's other charges of infringement described in paragraph 7—"

Mind you, your Honor, it says:

"Because of the pendency of this suit and counter-defendant's other charges of infringement described in paragraph 7 above".

The Court: Which all have to do with American patents and not pool patents.

Mr. Kayser: Yes. "Counter-defendants" I think he means, obviously, "counter-plaintiff," or "cross claimant" or whatever—"has been forced to delay expansion of its foreign trade in England, Canada, Australia and other countries where in furtherance of the conspiracy alleged herein counter-defendant's inventions and patents are employed to restrain and prevent importation and trade. But it is because of the pendency of this suit and counter-defendant's other charges."

[30] Now, if we will go on to the—

The Court: That, in your opinion, knocks out the prior reference to the conspiracy to prevent importation.

Mr. Kayser: Well, yes, your Honor, of course he had to—

The Court: Even though it says it includes and doesn't say excludes all other causes of action.

[31] Mr. Kayser: Yes. Yes, and I would like to go for a moment to the Prayer, because I thing this is also very instructive in determining what Mr. McConnell was saying at that time.

He says:

"1. He prays a judgment against counter-defendant for treble the amount of damages sustained by defend-

ant as the proximate result of said acts of counter-defendant and its co-conspirators and for costs and attorneys fees."

The Court: I mean, what acts do you say "said acts" apply to?

Mr. Kayser: "said acts, the pendency of the suit and the other charges of infringement."

The Court: All right.

Mr. Kayser: Now, I would like to inject one comment here, and that is his references always to the acts of counter-defendant and his co-conspirators; obviously what he is doing there is what he has done all the way through this case, is to say, "You have got a conspiracy and, therefore, your acts are his acts and his acts are their acts," and that is what he means when he talks about—

[32] The Court: Well, certainly in regard to the American patents, there was no evidence or any charges in the pleadings in regard to a conspiracy in regard to the American patents, was there? I mean, this is strictly put on Hazeltine, on their package deal thing and Hazeltine had no co-conspirators in regard to American patents, did they?

Mr. Kayser: Well, your Honor, I agree, but Mr. McConnell said that they did.

But what is his theory here?

I mean, how could there possibly be a theory here?

Well, it is a far-out theory, but he elucidated it during the trial and pre-trial; his theory was that these acts were detrimental because if there were counter-part patents in England, or Canada, or Australia, or wherever, that if he took a license here or if the patent was found valid here that then this would somehow aid the foreign pools to enforce the counter-part patents, and that was his entire theory in this make-way antitrust counterclaim as he filed it. Maybe it doesn't make much sense, your Honor. I

agree that it doesn't either. It was a make-way counter-claim.

The Court: I agree, too.

[33] Mr. Kayser: It was a make way counter-claim.

But I would like to refer briefly, if I may, to these affidavits—

The Court: You may refer briefly or at length, whatever your pleasure is.

Mr. Kayser: Thank you.

The Court: I have indicated that there would be no limitation on this, because a substantial question and sum of money is involved and, therefore, there will be no limitation.

Mr. Kayser: Yes. I would like to refer to the Crotty affidavit of March 21, 1963, which was served on Hazeltine on March 26, 1963, at the time they were originally proposing the counter-claim which actually wasn't filed until later.

He says that:

> "The matter as alleged in paragraphs 6 to 9, counts 1 and 2 of defendant's counter-claim to which this affidavit is attached, and which are the proximate cause of damages alleged and require the release sought in said counter-claim occurred after the filing of the [34] answer herein."

Now, he is expanding it a bit. Instead of saying the damages, or the acts or what is alleged in 7 to 9, he says it is in 6 to 9. These are the acts which require the filing of this suit or this counter-claim, he says, some two years after the answer was filed, these are the acts which caused the damage, these are the acts complained of.

Your Honor, your general conspiracy isn't there, and we are right back—the one thing he does is buttress the very fact that he was relying on the threats of infringement plus the suit, because paragraph 6 merely talks about some more

and a little bit earlier, possibly, license negotiations, which weren't included actually in the counter-claim. But so far as the international conspiracy as being the act that caused the damage, he clearly rules it out, and what is more, Mr. McConnell also clearly rules it out in his motion, because he says—

One of his motions he said:

[35] "Said counter-claim arises out of the matters set forth in paragraphs 12 and 13 of defendant's answer."

Those are the general allegations, yes.

> "—herein and current related unlawful activities of plaintiff occurring since the filing of the answer—current related unlawful activities of the plaintiff occurring since the filing of the answer, which activities are the proximate cause of present and continuing damage to defendant sustained after the filing of the answer."

Now, we have got not only the counter-claim, we have got the motion of two of Zenith's lawyers as officers of this Court, we have got the affidavit of the third lawyer as the officer of this Court, and I think that buttons it down, your Honor, as clearly as it can be.

The Court: Now you are referring to your B on the chart, is that it, as to the period of damage?

Mr. Kayser: No, no, I am referring to A and B [36] because these current activities that they were talking about are these, the pendency of this suit, the alleged charges of infringement.

The Court: All right.

[37] Mr. Kayser: All right.

Now, as concerns the cause of action which actually came out in the findings, and I think possibly to some extent crept out at the latter stages of the trial but were never, never stated until the findings, were never, never put in

an amendment to the pleadings, were never announced to Hazeltine, and that theory of action is the one as I say here at the right in which Zenith now relies on the activities of these pools going back over many years. Yes, they limit themselves as to damage to the four-year period before they filed their counterclaim, but when they ask for damages they ask on the basis of what I call, and I think quite properly so, the theory of a fully-matured market, and I have here, your Honor, a chart which we have prepared and which I think shows very graphically the difference between what was pleaded and the difference of what is in the findings, and the very, very grave effect this has concerns the problem of Hazeltine to defend and, of course, the problems of this enormous prospective possible judgment.

Here, your Honor, is what they pleaded. They [38] pleaded this loss of profits and delay in expansion during the period October 18, '61, to May 22, '63. Just what this is supposed to have been—you see these red question marks, they are question marks because they never bothered to put in any evidence on the subject and we haven't the slightest idea what they claim in that respect. But it is clear that all they were asking was damage during this period from these acts and only delay and expansion.

Now, what was it that they came up with in their findings and in their Exhibit 218?

Mr. Wright got on the stand, and on the basis of Zenith's experience in the United States, where they have been in radio since 1923 and in television since about 1948, said we have got—Oh, he estimated 20 per cent of the American market. I think he was puffing, as a good executive, good salesman should do, but the figures that they came up with, he said that on the American market, as of June 1, 1959—they changed the date for convenience, I guess, by nine days—that Hazeltine—or, rather, Zenith had 15.6 per cent in

this case, and this chart has to do with television, 15.6 [39] per cent of the American television market on that date, and he thought that Zenith could do at least as well in Canada, so that had it not been for the acts of these pools and conspirators that on June 1, 1959, Zenith would have had 15 per cent point 6 of the Canadian television market.

He guessed that except for these pools Zenith would have had maybe half as much of the English market as the American market and—

The Court: Half as much or twenty-five—

Mr. Kayser: Well, he said half as much, but Mr. Kaplan corrected him, your Honor, and cut it down to 25 per cent.

On Australia, Mr. Wright wasn't asked to testify, but Mr. Kaplan decided—I don't know how he decided it, but he decided that they should claim damages for 10 per cent and that that would be the basis that they would, except for the pools, they would have had a fully matured market in Australia equal to 10 per cent of their American share, and I think that came up somewhere between 1 and 2 per cent.

[40] But, in any event, translating these claims to Canada and to TV, this is—this chart, this page number 2, is what it comes to. They say that Zenith should have had 15.6% starting June 1 and this 15.6 December 31, 18%, December 31, '60, and so on, and then they say that here is the per cent of the Canadian market in black, Zenith Canadian sales and, therefore, this loss of profits which they are claiming for Canada television is all this vast area of red which is not just delay in expansion, this is a fully matured market, your Honor. It isn't just from October 18, '61, it is from May 22, '59; so I think you can see quite graphically from that just what a startling change, what the startling economic effect is to Hazeltine, rightly or wrongly—maybe it should have been caught. I say there

was a degree of deception and entrapment here which justifies that the thing was not caught, but here is as graphic an explanation and picturization as I can give of the tremendous effect of this silent shoe horning in of a new theory of action.

In equity, your Honor, and that is why we filed this motion in the first place, in equity we submit that [41] regardless of who was or who wasn't at fault, this sort or thing just should not be tolerated.

The Court: This type of proof is admissible in these kind of cases, isn't it, when by virtue of conduct they are unable to get more axact figures.

Mr. Kayser: Oh, no, your Honor. No, I am not now talking about the question as to whether or not this would be a fair estimate as to what a fully matured market would be. I am coming to that later.

What I am talking about here is the fact that whereas he pleaded merely delay in expansion for eighteen months—

The Court: You are talking about the time period now rather than the—

Mr. Kayser: No, I am talking about more than the time period, I am talking about the theory, also the change in theory from the mere delay in expansion from whatever point they might have been on October 18, 1961, or even May 22, '59. I am talking about the fact that they no [42] no longer asked merely for the loss of profit from a delay in expansion but that they suddenly come in here and ask for all profits from a fully matured market. Now, whether they are right in suggesting that Canada should be parallel with the United States and that England should have a quarter as much—I mean, they should have a quarter of the same percentage in England, I am not talking about that. I am talking about the complete switch in theory, not the adequacy of the proof, if we were to assume that they were allowed to switch the theory.

[43] The Court: Do you think this is merely gilding the lily and has no legal effect in their counterclaim when they refer to the conspiracy to prevent importation of American-made television and radio sets? Is that just nice language or is that the basis of a lawsuit?

Mr. Kayser: It is not the basis of the lawsuit to which they pleaded, your Honor.

Your Honor, a party ought to have the right, when he is faced with a pleading, he ought to have the right to assume that that is the case he is going to meet, have to meet.

The Court: I know. You don't have to convince me of that. I agree with that.

Mr. Kayser: Well, all right, and if the other party wants to change, he should do so by leave of court and on adequate notice.

The Court: I think the question is whether or not they did change. I think that that is the question.

Mr. Kayser: Yes.

As I say, I cannot see this anywhere in this counterclaim.

I cannot see it in their opening statement. I cannot see [44] it in their pretrial brief. This is something which evolved silently, gradually and appeared in full force in their findings and conclusions for the first time.

The Court: Well, I can't say that, looking at the pretrial briefs, that there wasn't adequate warning that this was their theory prior to the time any evidence was adduced.

Mr. Kayser: Well, of course, your Honor, there was reference to the existence—

The Court: That is the nub of the whole question, and the nub of the damages was the failure to permit importation of American-made merchandise into these three countries.

Mr. Kayser: The nub of their damage claim was what was stated in paragraph 9, your Honor.

The Court: All right.

Mr. Kayser: Surely, the other things were in there as identification of the alleged conspiracy of which—pursuant to which these acts were alleged to have been done, but it is these acts which were alleged as being the cause of the damage.

The Court: I don't see that anything in paragraph 9 has to do with a conspiracy in regard to importation.

[45] Mr. Kayser: Sir?

The Court: I say, I don't see that A, B and C have anything to do with a conspiracy in regard to blocking importation.

Mr. Kayser: Well, they have to do with these acts which is said are alleged to be in furtherance of it, the last half of C. But the charge, I certainly agree with you so far as the charge is concerned, no, they have nothing to do with conspiracy. They have to do with the effect of these acts.

The Court: All right. You may proceed.

[46] Mr. Kayser: But I think we have to admit certainly that there are references to conspiracy all through the counter-claim. The counter-claim is full of references to conspiracy but not to those conspiracies as being the acts.

Well, your Honor, one of the grave detriments which came out of this switch, as we have pointed out in our motion and the brief, was this question of release, and say that by this switch in theory in the middle of the case Zenith apparently decided to collect for a second time for these claimed activities in the so-called Zenith-RCA litigation.

The Court: When was the RCA release signed?

Mr. Kayser: It was signed, as I understand it, on September 27, 1957.

The Court: As I understand it, they are only claiming, according to your chart, from May 22 of 1959 to May 22 of 1963.

Mr. Kayser: Yes, your Honor, that is very true.

The Court: And as I understand the pleadings and the evidence, after this release was signed, why, they had no difficulty with those patents of RCA and others as far [47] as the Canada pool was concerned or any other pool was concerned.

Mr. Kayser: That is my understanding, too, that they had no difficulty with any of those pools after the release was signed.

The Court: And the only reason importation was banned from Canada after the release was signed was because they embraced Hazeltine patents that were in the patent pool and not RCA or other patents in the patent pool, isn't that the way you understand it?

Mr. Kayser: No, I cannot agree that any patents of either Hazeltine or its parent have in any way interfered with—and I will get to this—interfered with any ability of Zenith, when it wanted to, to import into any of the three countries.

But I would like to get back to this release.

The Court: I would like to have you, and I wish you would, since I am not sufficiently astute today to understand your theory, I wish you would approach it on a first grade level so that I can understand how this—

Mr. Kayser: Well, your Honor, it will have to be on a first grade level for me to understand it, too.

[48] The Court: So that I can understand how this release in '57 has anything to do with what occurred from '59 to '63.

Mr. Kayser: Yes.

The Court: If necessary, you can draw some pictures to make it clearer to me.

Mr. Kayser: Yes, your Honor. I think my own experience is that I can understand things better if I draw some pictures.

The Court: And I will be happy to look at them in this case, because I think I need some.

Mr. Kayser: Well, let me lay the background of this first.

The Court: I think I am aware of this lawsuit and the consent decree and the settlement and that sort of thing, so that we can skip the kindergarten stage of it and start in first grade.

[49] Mr. Kayser: Well, first before we get to the release itself—

The Court: Yes.

Mr. Kayser: —I first want to point out that Zenith has taken the position ofttimes repeated, and joyfully, in this case that Hazeltine and its parent Hazeltine Corporation were conspirators with RCA, General Electric and Western Electric. We heard a great deal—prior counsel heard a great deal in this case about—

The Court: I assume on their theory of the case that prior to 1957, the date of this release, they were.

Mr. Kayser: That is their theory, that is right, which we, of course, deny.

But, nevertheless, that is their theory.

The Court: Do they have a theory that they continue to be conspirators with RCA and General Electric after '57?

Mr. Kayser: Not so far as I know, your Honor, no. But it is their theory that—

The Court: As I understand it, RCA, General Electric and Western Electric withdrew at the point of a gun from the conspiracy in 1957.

[50] Mr. Kayser: Well, I don't know whether that is—

The Court: And, having withdrawn, they are no longer responsible for the acts of those conspirators still in the conspiracy after they have withdrawn.

Mr. Kayser: I think that would be a fair statement of the law, your Honor.

The Court: That is my understanding of it.

Mr. Kayser: That is right.

The point is, they have—No. 1, they asserted that these parties were members of that conspiracy and we say they are stuck with their contention.

The Court: Do they say they were during the damage period? Do they say it?

Mr. Kayser: No, they do not.

The Court: Well, I mean, why are we concerned about whether they said prior to 1957, prior to the date of this release, that they were conspirators? What difference does that make in this lawsuit?

Mr. Kayser: If I may, your Honor, I think—I would like to come to that because there is a—

The Court: I think maybe I will just sit back and quit evidencing impatience.

[51] Mr. Kayser: I welcome all questions because sooner or later I try to get out what I would like your Honor to—

The Court: And I think that I should permit you to do so without these interruptions, and I apologize.

Mr. Kayser: As far as I am concerned, any questions that you want, I welcome them, whether or not I can answer them.

The Court: No, except that I ask these questions and you tell me that you are on your way to answering them so that perhaps if I don't ask them, you will have answered them without my asking the questions, and I am going to permit you to do so.

Mr. Kayser: Yes.

Now, your Honor, if we read this release, which we understand was given by Zenith and Rauland, its subsidiary to RCA, to General Electric, and to Western Electric in about September 27, 1957, we can prove at least one of those, and, I dare say, maybe Zenith would admit it, we

will find that the release includes—I start at the middle of the first page:

"All and all manner of acts and actions—"

[52] And I won't read all of that boiler plate.

"which against said RCA, for example, its subsidiaries and their respective successors and assigns, the said Zenith Radio Corporation and the Rauland Corporation of each of them ever had, now has—"

And here is the part that is important:

"or which each of them and their respective subsidiaries, successors and assigns hereafter can, shall or may have—"

The Court: Against who, RCA, Rauland, or against everybody in the world?

[53] Mr. Kayser: Well, may have against General Electric, RCA and Western Electric.

The Court: Very good.

Mr. Kayser: For or by reason—"For, upon or by reason of any matter, cause or thing whatsoever" from the beginning of the world to the day of the date of these presence, not including the irrelevancy about unpaid balances on goods.

The Court: Yes.

Mr. Kayser: Now, we start first with the proposition and the clear law that—

The Court: Is it your theory that this is a release of other than those—

Mr. Kayser: Oh, yes, your Honor.

The Court: —other than those who signed the release?

Mr. Kayser: Oh, yes, your Honor, the law is inescapable.

The Court: Then you get to that because that confuses me.

Mr. Kayser: Yes, the law is inescapable that this is in the nature of a joint tort; when you release one joint tort feasor, you release all of them. This is an unqualified [54] release of these three. Anybody else which according to Zenith was a party up to September 27, 1957 is released, released them for everything that they did in the past up to that time or all damage which might thereafter be suffered from any acts which occurred up to September 27, 1957. Anything which results after that date from any act done by any of them up to that date.

The Court: Is it your theory that this release releases all of the members of the Canadian pool? I want to be clear on this.

Mr. Kayser: I think so, your Honor, to the extent, to the extent that Zenith takes the position that they were a member of the conspiracies and pools which Zenith complained of in their lawsuit, yes.

The Court: What is the purpose of writing in specifically in these various releases RCA in one, Rauland Corporation in another, General Electric in another, if it—

Mr. Kayser: Well, the reason it was done in three documents, I assume, is so that each one would have one.

[55] But, your Honor, this is the law of torts. This is the law of release and there is no question about it, your your Honor, either in Federal Courts or under Illinois law clearly the release of one joint tort feasor releases them all. The only way you can get around that is by covenant not to sue. That is why the covenant not to sue is used.

The Court: And does that apply to conspiracy as well as substantive conduct?

Mr. Kayser: Yes, it does, your Honor. There are at least three cases clearly on the point involving antitrust treble damage cases.

The Court: That is by realeasing one conspirator in a conspiracy you automatically release all other conspirators from the beginning of the world to the end of the world.

Mr. Kayser: No, no, up to the time of the release and for any acts or any damage suffered thereafter by reason of acts occurring up to the time—

The Court: By another co-conspirator who is not a party to the release.

[56] Mr. Kayser: Yes, your Honor. I don't think that there is any question that that is the law.

The Court: All right.

[57] Mr. Kayser: Well, now, we come finally to the question which your Honor quite properly raised in the first place, and that was, what does the 1957 release have to do with a claim of damages from 1959 to 1963.

The Court: Well, I mean, under your theory I understand what it has to do, because your theory is that from the date of this release all other members of this pool or alleged conspiracy have been released by virtue of this Rauland-RCA-General Electric release.

Mr. Kayser: To the extent of any results from any acts which occurred up to that date.

We are not saying, your Honor, not suggesting for a minute that this is any release of any liability on account of any acts in the future.

The Court: Oh, I see.

Mr. Kayser: As a matter of fact, there are cases, and I am sure Mr. McConnell would mention them if I didn't, there are cases which say that if you try to release the effect of a future violation that that is against public policy.

Now, we are not contending that for this release at [58] all. What we are saying is—

The Court: That anything that any conspirators did up to the date of the signing of this release—

Mr. Kayser: Yes.

The Court: —Hazeltine has been exculpated or excused from by virtue of this release.

Mr. Kayser: And including all after effects of those acts,

all after effects of those acts are also released. It says so specifically.

The Court: What says so?

Mr. Kayser: The release says specifically that it includes all claims which the released party hereafter can, shall or may have, you see. All after effects of anything up to that date are released.

The Court: And it says that this applies between Zenith Radio and Rauland Corporation.

Mr. Kayser: No, they are the executing parties. That is parent and subsidiary, your Honor. They gave this form of release running to RCA, to GE and to Western Electric.

The Court: Oh.

Mr. Kayser: And, of course, we, as alleged co-con- [59] spirators, which we deny, but which is alleged, we say that under Zenith's position in this case, which it is bound by, we have the benefit of that release.

The Court: Let me clarify this further: Assuming that perhaps there was a conspiracy in existence prior to the day of this release,—

Mr. Kayser: Yes.

The Court: —and that this conspiracy continues among other co-conspirators after the date of the release, what is Zenith's position in regard to those co-conspirators in the conspiracy that continues after the date of the release which in any way have some unlawful effect on Zenith's business.

Mr. Kayser: Well, I would think, your Honor, that absent any exceptional circumstances that this release would not apply.

As I said, the release would not apply to unlawful acts which occurred after the date of the release itself. I don't think it would, and we are not suggesting that this one does.

The Court: Well, I mean, assume that the unlawful [60] acts prior to the release, that the object of the con-

spiracy and the way it was furthered, are by barring from Canada, let's stay with Canada, the importation of American made sets, barring them to the extent that they suggest to any dealers in Canada that, "If you sell American made Zeniths, you are not going to get any Canadian made sets to sell and we will drive you out of business." Supposing the same condition exists after the date of this release as existed prior to the date of that release, wouldn't that be a continuation of the same conspiracy?

Mr. Kayser: It could be, but they still couldn't collect to the extent that they had been hurt or were thereafter hurt by reason of acts which occurred prior to the date of the release.

Any cause of action which they had would have to be based entirely on acts which had occurred after the date of the release, and we are going to show your Honor—

The Court: I assume now that you are approaching, and you indicated that you would approach, the question of whether the right to recover depends upon whether [61] there was an overt act during the damage period and that if there is no—isn't that your theory, that if there is no overt act during the damage period, why, they can't collect? Isn't that what you said in your brief?

Mr. Kayser: That is right. Of course, there are two parts to that, your Honor.

The Court: I mean, you are getting to that?

Mr. Kayser: Yes. Your Honor—

The Court: I won't rush you on your way.

Mr. Kayser: I am going to dwell at great length on this question.

The Court: Very good.

Mr. Kayser: Where did anything happen which hurt them.

Your Honor, I intend to ride heavily on that one.

The Court: Very good.

Mr. Kayser: Now, if I may finally, to explain the effect of the release and the fact that it releases any resulting continuing activities, Zenith, in claiming, as they do, a fully matured market here beginning May 22, 1959—

[62] The Court: They claim they had a mature market or that but for the conduct of Hazeltine they would have had one.

[63] Mr. Kayser: They are claiming that they were entitled to the benefits of a fully matured market, yes.

The Court: Which they said they would have had, had it not been for the conduct of Hazeltine as co-conspirators.

Mr. Kayser: That's right.

The Court: All right.

Mr. Kayser: And as we shall show, not that necessarily the acts they were relying on—the after-effect of them occurred prior to this September 27, 1957, date, because we are going to go chapter and verse and right through history as to what happened after September 27, '57. And we are going to prove that there wasn't a single thing there which in any way affected their business. We are going to prove that particularly here in Canada, they were just as fat and sassy as they could be after that settlement, except only when they got over to '62 and the Canadian Government put in a tariff. We are going to show that, and we are going to show that from their own annual reports.

The Court: Go ahead.

Mr. Kayser: In other words, then, we will show [64] that this release bars all their—substantially all their claims, because when they claim the right to start at this high point and they claim they are entitled to damages on that theory, they are necessarily claiming that it was but for the acts back of this conspiracy that they would have been there.

The Court: And the release having been signed two years prior to the beginning of the damage period?

Mr. Kayser: That is right, because it released all of the after-effects of it, and they claim that but for these acts they would have been here. So it was these acts that prevented them from being there. These acts are released, barred by the—

The Court: I mean, they don't specifically say that. I mean, there is a two-year period between the date of the release and the beginning of the damage period.

Mr. Kayser: Yes, your Honor. I would like to discuss that two-year period. I would be very happy to do so.

The Court: Very good; very good.

Mr. Kayser: Now, I think, your Honor, I will proceed out of order—

[65] The Court: Is this a good time for a recess? We are going to take one.

Mr. Kayser: Yes. I'm just getting under way, so it's fine. This is a good breaking point.

The Court: All right. We will take our afternoon recess and give you a chance to re-form.

(A short recess was taken, after which the following further proceedings were had herein:)

The Court: You may proceed.

Mr. Kayser: Thank you, your Honor.

I would like to go now to a subject which I believe was suggested by one of your last questions, and that is as to actually what happened after this September, 1957, release.

Now, as your Honor knows, the mere fact that there is or may be an unlawful conspiracy or an unlawful patent pool by itself doesn't give any third party any right to any claim of damage. They are entitled to claim damage only to the extent that it can be established that something which that unlawful conspiracy did has caused the damage.

The Court: Unquestionably, I agree.

Mr. Kayser: Yes.

[66] Now, the testimony as to the so-called fact of damage in this case was given by Mr. Wright and Mr. Kaplan of Zenith. I would like to come to that later. I would like to discuss, first, just what the facts are as to the fact of damage. Was there in fact any damage suffered by Zenith after this 1957 release; was there any restriction of any sort, and damage to the import business under this new theory of theirs either in Canada or in England or in Australia?

Now, there are two products involved here, your Honor—

[67] The Court: I mean, if the conspiracy continued, do you concede that there might have been?

Mr. Kayser: Well, if we were to assume that a conspiracy continued, yes.

The Court: Let's make it nebulous.

Mr. Kayser: All right.

The Court: If there was an alleged conspiracy to start with, and if this alleged conspiracy continued, do you concede that it might have—

Mr. Kayser: As an abstract proposition, surely, surely.

The Court: All right, fine. Very good.

Mr. Kayser: Now, as I said, the products involved here are radio and television.

The Court: Yes.

Mr. Kayser: Now, as concerns radio, the question of any damage to Zenith in connection with imports of radio into these three countries, I believe that on the face of this record, as we said in our memorandum, we can forget that because Zenith has admitted that by this time there were no significant radio patents which could have been used by anybody to keep them from importing.

But I also want to point out that even irrespective [68] of that fact, the proof—

The Court: Well, assuming that there weren't.

Mr. Kayser: Assuming that there were, sir?

The Court: That there were not any such patents, what would the effect be on Zenith if, despite the fact that there were no significant patents involved in radio, they continued to threaten retailers with loss of Canadian products if they continued to sell Zeniths?

Mr. Kayser: Well, of course, there never has been any evidence or suggestion—

The Court: Well, there was some evidence that at one time that occurred.

Mr. Kayser: The contention was, and there is some claims in years past, that dealers were threatened with infringement suits if they sold imported sets.

The Court: That's right, which would cause them to hesitate and pause to continue to sell Zenith—measuring the disadvantages of selling Zenith or defending themselves in an infringement suit.

Mr. Kayser: Yes. Well, I think we can possibly agree that if there were anything like that, if [69] there were any such facts and circumstances, that that could interfere, yes.

The Court: All right.

Mr. Kayser: But the fact of the matter is, your Honor, there is no evidence in this record that there were any such during this four year period.

The Court: All right—or in the two year period preceding it?

Mr. Kayser: There is one claim as concerns Canada, and I'm coming to that, but during the '58 to '59 period—in late '58 and the early months of '59, there is some ambiguous testimony that a Mr. McConnell—not the same gentleman—of the Canadian pool is supposed to have made certain implications against Zenith, and also that in '58 there was some question, I believe, in the record as to

whether some statements weren't made to some Canadian dealers, yes. Except for that, and that's prior to the four years, there is no evidence in this record.

Now, I first want to turn to the subject of Canada and what happened after the 1957 settlement. I think I can demonstrate on the basis of Zenith's own annual report [70] that there wasn't one plugged nickel's worth of damage suffered by Zenith by anything claimed to have been done by these Canadian pools, or this so-called Canadian pool.

[71] The Court: Is there something in the reports that indicate Zenith, during that period, had the same share of the Canadian market that they had of the U. S. market?

Mr. Kayser: No, no, they never did, your Honor. They never did.

I would like to hand up an excerpt from Zenith's annual reports. We have reproduced copies of all of the reports here in total, and these are excerpts from them.

Now, I would like to point out, first, the excerpt from the 1957 report. This is the annual report to shareholders, your Honor, and it says there—this is '57—it says, "In addition, your company is inaugurating an aggressive program to set up distribution of radio and television receivers in Canada where it has previously been excluded from participation in the market through the operation of a cartel."

And there is a description there of what they are proposing to do. So we see here the reference to the asserted cartel and to Zenith's efforts to go into Canada. The cartel —I suppose this is the familiar Zenith-RCA litigation settlement.

[72] So we come, next, to—

The Court: That of course could refer to the question that they now were at liberty to sell in Canada—

Mr. Kayser: Yes.

The Court: (Continuing) sets that involved patents of RCA, Westinghouse, and General Electric. I mean, that could refer to that.

Mr. Kayser: I think—well, your Honor, I don't think so. I think that would be a great stretching of the language. This is supposed to be their reports to their shareholders.

The Court: I understand that. But, I mean, you agree that after this release, they then were free, without threat of infringement, to sell in Canada sets that only embraced patents of those companies with whom they—to whom they had given a release. You agree that they were now free to do that, don't you?

Mr. Kayser: Yes.

The Court: However, there is nothing in those releases which barred threatened infringement suits from Hazeltine and the pool in regard to other patents in the pool that [73] weren't the subject matter of these releases; isn't that true?

Mr. Kayser: I believe that's correct.

The Court: So that expanding in the Canadian market—I mean, it would be a fair interpretation to say that they now were home free in regard to these particular patents, the subject matters of the releases.

Mr. Kayser: Your Honor, that isn't what it says.

The Court: That isn't what it says?

Mr. Kayser: It says they previously had been excluded from participation in the market through the operation of a cartel. It's quite clearly indicated, as far as they are concerned, they are free to go.

The Court: I mean, I agree that that is an inference that can be drawn from that statement. I agree with you.

Mr. Kayser: Yes, sir. And if I may, I would like to now go to 1958.

The Court: Of course, nobody ever passes on bad news to stockholders unless—

Mr. Kayser: I don't agree with that, your Honor. Zenith does.

The Court: Unless the figures from the year [74] before make it necessary to do so. In regard to the future, stockholders are always given a rosy picture.

Mr. Kayser: Your Honor, I don't think that that is the case. These—and this is a matter of great significance that I will come to later. These reports on Zenith's subsidiaries and exports are just full of statements about the good and the bad problems, and the tribulations of exporting with the subsidiaries. It's very exhaustive, and it's very significant that it is exhaustive.

[75] The Court: Very good.

Mr. Kayser: Now, when we come to 1958, we see that Zenith Radio Corporation of Canada, which was previously engaged exclusively in distribution of hearing aids, during the year initiated the distribution of radio and television receivers in the provinces of Ontario and Quebec, and there is more discussion on that.

Then we go over on to the next page, the excerpt from page 6. We see that during the year an aggressive sales and operating organization was added to the personnel of the company subsidiary, Zenith Radio Corporation of Canada, to initiate the distribution of radio and television receivers, and so on.

So, now, we see that the plans in '57 are starting to be carried out in 1958.

All right. Now, let's go to the year 1959, the first year involved in this claim of Zenith's for all the loss of market due to the terrible activities of these pools. What do they say? They say on page 3 of these excerpts—it actually is page 6 of the report—they say, "The company's [76] Canadian subsidiary, Zenith Radio Corporation of Canada, showed marked progress in the sales of all products." Down below, "The radio and television division established

in 1958 doubled its sales over the first year, and in the closing months achieved a substantial gain in its percentage of industry sales despite a decline in overall Canadian industry sales of television receivers."

And they say down below there, they talk about the gratifying performance, and so forth.

Your Honor, right there they are talking about the same year where they claim we owe them all this money because we were interfering with their activities in the market place. Which is the fact? Is it the fact what they tell their shareholders, as a matter of corporation law, SEC regulation, and so forth, or is this the fact? They can't both be the facts.

Now, let's go on to 1960.

The Court: I mean, doubling its sales in 1959 could mean that they sold 2 television sets instead of 1.

Mr. Kayser: That's right.

[77] The Court: Than in 1957.

Mr. Kayser: That's right—

The Court: 2 television sets instead of 1.

Mr. Kayser: That's right.

The Court: That would double the sales. I don't know what that would mean, but certainly they wouldn't be misinforming their stockholders if that was—

Mr. Kayser: I wouldn't think so. But it does indicate that their business is flourishing at that time, certainly. And I want to come back to this question, had there been other factors, would we have heard about it in these reports or would we not. I'm coming back to that.

Now, in 1960, they say, again at page 4, "The Zenith Radio Corporation of Canada, Limited, in 1960 successfully countered again the downward industry sales trend which began in Canada in 1955, and made important gains in the sale of Zenith television and radio receivers."

That is another one of the years where they were supposed to be damaged so much by these pools.

[78] All right. Let's go to 1961, which is also in the period. We see the statement that they made at the bottom of page 4 that

> "The Zenith Radio Corporation of Canada made gratifying progress during the year selling more television receivers than in the two previous years combined, and they have a lot of enthusiasm and created a growing demand for Zenith products."

And that is reflected here, your Honor—we are going up, up to 5 per cent here. But there is one disquieting note in this report, and that is that Zenith—the fact is commented on at the middle of page 4 that

> "Profits were adversely affected during the year by the Canadian Government's action which put the dollar at a discount."

In other words, the government was stepping into the picture—the Canadian Government, not the Canadian so-called patent—the Canadian Government.

Then we come to 1962, and what do we find? They say:

> "Profits were again affected by curbs established by the Canadian Government. Its action in establishing an [79] exchange ratio which further discounted the Canadian dollar in relation to the U. S. dollar, and the imposition of additional tariffs presented serious obstacles to the Canadian operation."

As I recall, I think our offer of proof shows that the tariff went from 20 to 30 per cent. Of course, here we see it. Sales are down, but this cannot be ascribed to Hazeltine. It cannot be ascribed to any pools. This is the doing of the Canadian Government.

So, your Honor, we see that by Zenith's own reports,

their business has been good since '57. It has been flourishing except for the act of the Canadian Government.

We have then still the question, under those circumstances, of what is the theory of asking Hazeltine to pay for the difference between 2.6 and 15.6 per cent. Certainly it cannot be on the basis of anything which happened during these years. It can't be during the period of these annual reports. It must, therefore, necessarily be on the theory that but for the acts going back here, Zenith could have, [80] in the same period that it built up to this big market in the United States—Zenith could have built up its Canadian market. But the thing is, it got the release in '57.

All right. We have a couple of more countries to consider.

Incidentally, your Honor, on the basis of this kind of evidence and on the basis of that record, Zenith is asking Hazeltine to pay some over nineteen million dollars, despite their own annual reports, which we suggest ought to be considered to be far better evidence than the estimates, the guesstimates, that were made on the witness stand. Their annual reports are something they are bound by. These are admissions, your Honor.

Now, on the subject of England, I want to point out there that, again, Zenith proceeded on the theory of the fully matured market, and that in the case of television it claimed damages on the basis that from such fully matured market, that they should have had as a fully matured market—it's not the same height, obviously, but it's roughly 4 per cent of the English market beginning right again on May 22, '59. Again, we start with a fully matured market on [81] May 22, '59. Actually, they move it up to June 1, '59. From that date we are entitled to all the profits from the developed market. That is their theory.

[82] The Court: These releases covered all the countries of the world; correct?

Mr. Kayser: Oh, yes; oh, yes. As a matter of fact, in the record in this case, we see numerous references by Mr. McConnell to England and Canada and Australia, and the pleading in the Zenith-RCA case specifically referred to all three countries.

The Court: All right.

Mr. Kayser: Now, despite the fact that they claimed the benefits—the profits from the so-called fully matured market—that's what I call it, and I think that is a correct description of what they have asserted—we find in this case that Mr. Wright at page 1057 of the record testified that Zenith had found out somehow during the Zenith-RCA case that because of currency restrictions, they couldn't have sold in England or Australia anyhow, despite any pool restrictions, because by reason of the laws of England and Australia they were barred. So we see that Zenith certainly was aware of this type of restriction in England. They admittedly knew it as late as September, '57. But nevertheless, when we came to their theory of action [83] in the spring of 1964, we find them claiming a fully matured market and saying, but for the acts of the English government, but for the acts of this English pool, they could have had 4%, or 3.9 plus of the market. They don't blame the government. They blame the pool, and then they say they want to collect from Hazeltine some twenty-eight million dollars.

Well, now, I suggest that Zenith has a pretty short memory when it comes to the restrictions of foreign laws. And as we pointed out in our offer of proof, not only was there in fact an embargo on the importation of radio and television into England in September, 1957, that embargo actually lasted until June 8, 1959—in fact, some three weeks

after they claimed they should be having a fully matured market, and they want to blame Hazeltine for it.

The fact of the matter is, it was the English government that was keeping them out of it. It wasn't Hazeltine. If they don't like it, they better sue the British Commonwealth.

Now, we have a little bit more additional corroboration on this embargo, your Honor. We have—first, this [84] we would be prepared to prove—some more details on that. We also have a cable from the British Board of Trade, which is a branch of the English government which administered it. And for ease in reading, if your Honor desires, we have had the cable typed up because the printing is rather hard to follow. It's hard to read. As a matter of fact, I received, and haven't had a chance to digest it, a whole raft of the English statutes and regulations of the Board of Trade and so forth. But I say they just came in, but here we have got a group of papers on this same subject. And I think it is indisputable that until June 8, 1959, the laws of the British Commonwealth or United Kingdom prevented the importing of radio and television from the United States, and yet here we have Zenith asking to hold Hazeltine for the damages on the basis of some theory that Hazeltine or these pools interfered with the development of a fully matured market. And it wasn't that at all; it was the English government.

The Court: Do you agree with the theory that sometime litigation must end?

[85] Mr. Kayser: Yes, your Honor.

The Court: And these offers of proof are now being made more than one year after the proof closed on this case?

Mr. Kayser: Your Honor, this I think is one of the most unusual cases that will come into a Courtroom, in that we have here, as I think we can demonstrate—without

basis we have here the danger of a judgment of almost forty-nine million dollars which will spell corporate death, which is subject to the affirmative defenses of limitations and of releases. This forty-eight million dollars is to be based on Exhibit 218 which is a group of papers, I submit, which was gotton together so hurriedly that it wasn't even typed. That, your Honor—that forty-eight million dollars, this group of papers, and I suggest that—

[86] The Court: I just got through instructing a jury that in deliberating on their verdict, they should not take into consideration either sympathy or prejudice.

Mr. Kayser: Your Honor, I submit that a jury and most certainly, I respectfully say, that this court—

The Court: That rule also applies, I assume, to bench trials.

Mr. Kayser: I submit most respectfully to this court that this court should take into account equity. This is not a matter of sympathy. This is a matter of equity and a matter of justice; that this judgment, which will spell the death of this corporation, has had absolutely no basis whatsoever. It is subject to affirmative defenses. It was accomplished by a subtle switch in theory. Maybe it should have been caught; maybe it shouldn't. But is your Honor going to penalize this corporation—

The Court: I mean, it wasn't even caught 90 days after the proofs closed.

Mr. Kayser: I agree, that's true. I agree. This is a very unusual case; we recognize that.

The Court: You may proceed.

[87] Mr. Kayser: Now, on the subject of these regulations, the fact that Zenith couldn't have imported under any circumstances until June 8, 1959—does it by any chance happen that Zenith pleaded the way it did without knowledge of these restrictions? In other words, in good faith did it somehow think that, well, maybe we were interfered

with and didn't know anything about these English regulations?

Well, they knew about it in '57, Mr. Wright admitted that. But they also knew about them in 1959 because, again, it shows in their annual reports at the bottom of page 2 to 3 of these excerpts. They talk about the appointment—

The Court: Are these the same excerpts you gave me before?

Mr. Kayser: No. This is the same document, sir, but a different paragraph.

The Court: All right.

Mr. Kayser: At the bottom of page 2, they say:

> "Our exports to Europe in 1959 improved slightly due to the appointment in mid-year of an energetic independent distributor in the United Kingdom. For [88] almost thirty years previously, the British market had been closed to our product because of cartelizations and restrictions."

They knew about these restrictions and yet they still, even though it was the English Government that was interferring with the development of their matured market prior to '59—

The Court: What are you reading from? I mean, let's see if I have it before me. The one headed "United Kingdom Embargo"?

Mr. Kayser: No, I'm sorry, sir. It is headed, "Excerpts from Zenith Annual Reports."

The Court: You mean going back to the one you used in regard to Canada?

Mr. Kayser: Yes, yes, at the bottom of page.

The Court: I see.

Mr. Kayser: There is a specific acknowledgment from the bottom of page 2 to the top of page 3 that they knew of these restrictions. They told their shareholders about it.

The Court: Well, they don't attribute it to barring by the British Government. They say:

"For almost thirty years previously, the British [89] market has been closed to our products because of cartelization and restrictions."

Mr. Kayser: And restrictions.

The Court: They don't say restrictions. Cartelization and restriction.

[90] Mr. Kayser: Well, your Honor, Mr. Wright—

The Court: What the restrictions were, I don't know.

Mr. Kayser: Yes.

Well, Mr. Wright admitted they knew about them in '57 and we proved that they lasted until June of '59.

The Court: I mean, is it your position that it was solely governmental restrictions and nothing else, and that they gratuitously threw in this phrase "cartelization" when cartelization was not a factor?

Mr. Kayser: I don't deny they used those words, your Honor, but I deny that they have any basis to claim damages because they did not develop a mature market by May 22, '59.

The Court: Due to what?

Mr. Kayser: Sir?

The Court: Due to what, they didn't develop a mature market.

Mr. Kayser: They have no right, in law, to say that due to the restrictive acts of the pools that they couldn't develop a market by May 22, 1959, when the British Government wouldn't let them come in anyhow.

[91] The Court: They did say that in 1959 in their annual reports.

Mr. Kayser: They said—they referred to cartelization and restriction, yes.

The Court: Yes.

Mr. Kayser: They referred to cartelization, and I say that they had no right to hold Hazeltine liable on any theory of co-conspiratorship or otherwise when the reason they couldn't come in was because the British Government wouldn't let them come in.

The Court: And they were in error, then, when they informed their stockholders that they couldn't get in because of cartelization, is that it? They misinformed their stockholders when they said that?

Mr. Kayser: That is not my point, your Honor.

The Court: No, I know it is not your point, but it is your position, isn't it, that cartelization had not banned them?

Mr. Kayser: Yes, but let me assume as a supposition that there had been cartelization.

The Court: Yes, but, I mean, if it was cartelization it had no effect on their business, they were then misinforming their stockholders.

[92] Mr. Kayser: They were misinforming their stockholders—

The Court: That cartelization kept their products out of Britain.

Mr. Kayser: Yes, they were misinforming them because it was the British Government that—even if there had been no patent pools, no alleged restrictions, no nothing—

The Court: Do they give any greater credence to this misrepresentation than what they said in regard to Canada?

Mr. Kayser: Sir?

The Court: I say, you have relied on—you say they are bound by what you said in regard to Canada.

Mr. Kayser: Your Honor, a party is bound by his admissions. He cannot take advantage of his affirmative self-serving statements.

The Court: I fail to see how cartelization is a self-serving statement.

Mr. Kayser: Well, I mean, but so far as suggesting now—

The Court: It is a misrepresentation.

Mr. Kayser: But so far—if you are suggesting now that because we hold them to their Canadian admissions [93] that we somehow should be held to the notion that a cartel kept them out, I—

The Court: It does indicate some inaccuracies in their statements to stockholders.

Mr. Kayser: Yes, it does.

The Court: All right.

Mr. Kayser: Because the true fact of the matter is that cartel or no, they couldn't have come in. They couldn't have come in.

The point has also been made to me to defend Zenith's annual report on that, and that is that when they talked about cartelization for thirty years in there, in that report, and, as a matter of fact, these governmental restrictions that we have talked about, my understanding is, did not last the full thirty years, it was just from—as far as we know, from about 1951 on to 1959; so to that extent, their statement could be accurate in that the—

The Court: It would cover the period prior to '51.

Mr. Kayser: Yes.

The Court: All right.

[94] Mr. Kayser: Now, on the subject of these annual reports, and on the whole subject of damage in Canada, in England and Australia, there is a very interesting thing in these reports, or, rather a very interesting thing not in them. If your Honor will examine these excerpts, and if the reports are examined, we can see that there is a very detailed set of running comments each year concerning their export problems and their subsidiaries. There is talk, for example, in 1957, about the problem of nationalistic protection of local industries, dollar convertibility; '57 they

talk about the end of the cartel in Canada, and then in '58—they have comments here in '59, they talk about severe foreign competition from Japan, heavy inventory in Japan and so forth. '59 they talk about the end of the cartelization in Great Britain. But there is one thing missing, very significantly, and that is, your Honor, that there isn't anywhere in any of these reports one single word, there is not one single, solitary word about the—in this four year period, about the Canadian pool or about the English pool or about the Australian pool that over all of these [95] years is supposed to have caused them over this sixteen million dollar damage. They talk about low priced Japanese competition, they talk about nationalism, they talk about tariffs, they talk about all these other factors, and, yes, although they are giving their shareholders, and obviously giving their shareholders, to the best of their ability a thorough rundown about the problems and the trials and the tribulations they have, there is not one word about all of the so-called vicious pools who have caused all of this so-called sixteen million dollar damage. Now, I think that that is an admission by silence that I would like to know the explanation of.

The Court: I think maybe the explanation is the same as the efforts that are sometimes made by lawyers to impeach a witness by asking him whether or not the last time he was on the witness stand or at a deposition he said so and so, which he now says from the witness stand and when the witness says, "No" and the lawyer says, "Why?" the witness answers, "I wasn't asked."

[96] Mr. Kayser: Yes, but your Honor, they considered they were being asked because they were telling all of these things. They were telling all these things. But in this case—

The Court: I know of no requirement that you cry on

your stockholders shoulders each year in your annual report.

Mr. Kayser: Well, they did when they thought they had something to cry about. They did, your Honor, that is the point.

The Court: All right, it may be because they were not asked.

Mr. Kayser: Well, they were volunteering on everything else.

Now, I think on this subject of damage in England, I think a little piece of evidence here in this record which pretty clearly indicates just how reliable this testimony is that they put in on share of the market and damage and so forth—your Honor may recall that there was quite a bit of testimony in this case in connection with this claim of loss of profits as to the adaptability of an American television set for use in England.

[97] The record will show that your Honor asked a question or two on that subject himself.

Now, Mr. Wright, who was the lead witness on this subject, said on examination, well, there were some simple repairs and operations which a distributor could make in his backroom.

The Court: With a screwdriver.

[98] Mr. Kayser: With a screwdriver. You remember it, sir.

Mr. Kaplan repeated this and Mr. McConnell quite grandly added the finishing touch when he said that all the changes that were necessary the distributor could make in his back room with a screwdriver.

Now, we have included in our offer of proof an outline of the testimony which would be given by Mr. Bernard Loughren, who is an acknowledged authority, expert in this field. This is Item 5 of our offer of proof, and I would submit, your Honor, that if anybody can do this in the back

room of his store with a screwdriver, he is more than a genius, he is a magician, because this list shows a great many changes that need to be made, a great many parts that have to be substituted. There are all sorts of things in here which I must confess, not being a television authority, I can't understand, but it shows quite clearly that this would be a major job, and the fact of the matter—

The Court: As I recall, Mr. Loughren was in the courtroom after the statement was made about the screwdriver [99] and was not called to rebut the statement.

Mr. Kayser: As I recall, your Honor, he was here on the patent side of the case, not the antitrust side.

The Court: I am sure he was available.

Mr. Kayser: Well—

The Court: Working for Hazeltine, I am sure that he wasn't more than two hours by plane away.

Mr. Kayser: But the fact of the matter is that the testimony on that point is after the matter was investigated, as Zenith should have investigated it, Mr. Loughren investigated the matter. As this offer of proof shows, he obtained diagrams of typical Zenith sets. He obtained from the United Kingdom information as to their requirements, and after he had obtained all of this material he then is prepared to testify according to this offer of proof.

Now, your Honor, this is not something you can do overnight.

The Court: As I understand it, people are supposed to get ready for trial before the trial starts and not a year later.

Mr. Kayser: Yes, your Honor, if they know what [100] the cause of action is that they are supposed to defend against. That is the problem in this sort of thing. That is the problem.

The Court: All right.

Mr. Kayser: Our third country is Australia, where the

demand is rather more modest, they only want $700,000, or, roughly, $2,000,000 trebled, and they claim there, again, that they should have started with 1½ per cent, roughly, of the television market and 1.3 per cent, roughly, of the radio market, and that Hazeltine should make good the profit they say that they should have gotten from that, although the fact of the matter is that they never even tried to go into Australia. And it is also the fact of the matter, your Honor, that as this—

The Court: Having tried to go to Canada and England and having been rebuffed in the fashion they were, and knowing that the Australian pool's terms were identical, must they go through the motions of trying to get into Australia?

Mr. Kayser: Well, your Honor, they didn't know the terms were identical, because they weren't. They could have gone into Australia. They never really were [101] concerned to try it.

The Court: You mean there was nothing in the Australian pool arrangement about imports?

[102] Mr. Kayser: That is right, they could go into Australia. They can go into Australia today. The fact of the matter is that the evidence which they referred to on Australia is of two kinds; one is a raft of stuff which is twenty, thirty years old and is ancient history; and, secondly, they referred to a form of license agreement which was not the form they would have had to enter into. They could have gotten a license agreement without the restriction which they referred to in their finding in this case.

As a matter of fact, that is shown in the record but, your Honor, there was so much of this old twenty-year-old material in here that that was overlooked, but we make offer of proof to show that—

The Court: What does your offer of proof—what would

your offer of proof be in regard to what they could have done in Australia?

Mr. Kayser: That they could have gotten a license which would have permitted the import of Zenith sets, and that they can do that today and they have been able to—

The Court: Was that a package deal involving all [103] of the patents in the pool?

Mr. Kayser: That I don't know, but that is not the issue in this—

The Court: I mean, they could have got that in Canada, too.

Mr. Kayser: Oh, no, their complaint is that they could not get a license to import.

The Court: That is right.

Mr. Kayser: That is right. They could have gotten a license to import in Australia. They could have gotten it since 1951.

The Court: All right.

Mr. Kayser: As a matter of fact, the real reason that Zenith didn't go into Australia, if they ever had any interest in the first place, is quite apparent when you examine what, again, the restrictions in tariffs and so forth were and are of the Australian Government. Mr. Wright, again, testified that up until 1957 he admitted they couldn't go in because he said the currency exchanges and so forth, like in England, but the fact of the matter is that as we show in our offer of proof, the tariff on the import of television sets and radio sets into Australia is so large that it practically doubles the price of the set. That [104] is the reason they are not interested in Australia. We show that if—Zenith's 1962 average price for a television set was $136.80 and under the tariffs in Australia, the tariff and taxes would be substantially the same amount. It would double the price of the set, and how could they compete with the local manufacturer? This may not be right, your

Honor. Maybe we should have free trade, but this is the responsibility of the Government of Australia. This is not the responsibility of Hazeltine or the Australian pools. They could come in but they can't compete.

The Court: I mean, Hazeltine won't be punished for anything that the governments of any country do.

Mr. Kayser: Now, I would like to spend just a very brief moment on the testimony of Mr. Wright and Mr. Kaplan, which I submit is not supported by the record.

They testified—there is no sense in engaging in a controversy to any great extent as to what the cases say, who is qualified and who isn't. The fact of the matter is that there was no—first, no evidence that they really [105] did have the background and the knowledge to testify. One was a lawyer, vice president and president, and the other was a financial man. Obviously, the people who might have some knowledge would have been people from Zenith Radio, Ltd. in Canada who could testify to what was happening. A distributor in England—of course, they could call nobody from Australia.

The Court: What could a Canadian have testified to that would have—

Mr. Kayser: He could testify firsthand exactly what, if anything, was happening.

The Court: I mean, what would be the basis of his testimony as to the percentage of the market that Zenith would have had?

Mr. Kayser: He certainly would know far better than Mr. Wright, who is merely drawing an analogy. He would be far better qualified than Mr. Wright to know what the Canadian potential was.

[106] The Court: What would be the basis of his knowledge?

Mr. Kayser: Well, of course, your Honor, the share of the market which you get in Canada isn't necessarily a

matter of parallelism against what you do in another country. That is the point. It should be based on the knowledge you have of local conditions. That is the best knowledge. That is the best information, not what happened in the United States in Louisiana or California or New York. The question is, what are the conditions in Quebec, what are they in Manitoba, and so forth, not in the United States. The same thing is true in England.

But, in any event, there is another very significant point as concerns the testimony of these men, and that is that there was not one bit of corroboration of any kind, there was no information as to any sales lost, there was no information as to any distributors that refused to handle their merchandise, there was just a generality that somehow they should have had the share of the market, again, [107] based on the acts prior to the release. They didn't get it and therefore they should be entitled to sixteen million dollars. And, actually, the testimony that they gave here is really an exact parallel of the testimony which was given in this Wisconsin Liquor Park and Tilford case where exactly there was the same kind of testimony and the Seventh Circuit, in holding that it didn't do the job, said:

> "This testimony has no support in the record since there is no competent evidence of loss of customers or sales and could certainly be no basis for the assessment of damages. Recovery of an alleged loss of profits cannot be had on the basis of pure guesswork and speculative evidence as to the existence and extent of such losses."

Sure, people can use their best judgment, they can use their best judgment if they are qualified to use it, but the judgment of someone who is not qualified, the judgment [108] of somebody which is directly contrary with the record as is the testimony of these men, in conflict with their own annual reports and so forth, that we submit has no

weight. But the convincing thing, as I see it here, is that the annual reports of Zenith, the information as to the fact that they couldn't have gone into England anyhow until June of 1959, the fact that they always were free to go into Australia, make it quite clear that all of this so-called proof as to fact of damage is entirely without foundation.

Now, your Honor, there is another point which—

The Court: Well, I mean, regardless of the nature of this proof that you are talking about, the trial lawyer must have known that in regard to this counterclaim there was going to be some evidence offered as to loss of profits during the damage period, and regardless of the fashion in which that proof was offered, he certainly should have been sufficiently aware to know the things which you are telling me today, that prior to 1959, regardless of cartelization, they couldn't have sold anything in Britain.

[109] Mr. Kayser: No, your Honor. Why would he know that when the only thing he was faced with was a claim of acts occurring October 18, 1961? That is the point. There was nothing in this pleading which would alert him in the slightest of that sort of evidence, or this need to combat it. That is the point. He had no notice of this, none whatsoever.

The Court: Well, I mean, even assuming your theory of this, that the damage period starts on the 16th or 18th of October, 1961.

Mr. Kayser: In 1961.

The Court: —1961, would you say that this information which you now give me, and let's take Australia, that at all times they could import into Australia, that that would not be a good response to the claim in regard to Australia?

Mr. Kayser: Yes, your Honor, and he did make that response.

The Court: He did?

Mr. Kayser: Yes, he did, yes, he did. The one thing

that he failed to do, understandably, he did not put before the Court the current license agreement, the form, the [110] whole number, the form 7 as against 7B, which does not contain this paragraph which is found objectionable in the findings, but he did put in the—

The Court: And 7B came into effect when?

Mr. Kayser: That came into effect in 1961, but 7B is not the license form which would be offered to Zenith. That is a form which is used for local assemblers, according to the record, you see. There were two forms, there would be 3, 3B—

The Court: When did Australia permit imports of American manufactured radios and televisions?

Mr. Kayser: Since 1951, is my information.

The Court: Well, wouldn't anybody, even Mr. Dodds know that some claim was going to be made for damages from Australia during some period of time prior to the trial?

Mr. Kayser: Yes, and there is in evidence the license agreements through six, which carries, I think, up to—I forget whether it is 1961 or 1959 or what. Your Honor, I recognize the fact that this 7 should have been produced as well. But the record does—

[111] The Court: Was the Court ever shown any evidence that at no time did one need special dispensation from the cartel to import into Australia?

[112] Mr. Kayser: Yes.

The Court: I was shown that? That is in the record?

Mr. Kayser: Yes, there is record which distinguishes between 6 and 6B, 7 and 7B. But 7 was not—7, your Honor, was not in Court. We must recognize that fact. We confess that it was not in Court.

The Court: Well, was 7 the one that has to do with imports?

Mr. Kayser: Yes. The point is, 7 is the current one on imports. Then there is 6, 5—

The Court: I mean, 7 is the current one starting with '51?

Mr. Kayser: '61?

The Court: —'61 or '51?

Mr. Kayser: '61. But there is in the record one which starts with 1951, which was free of restriction. It is in the record. There is 5 and 6, and then there is 5B, 6B—

The Court: Was that argued by anybody in their post-trial briefs?

[113] Mr. Kayser: Yes, I think it was, your Honor. I think it was. But I will own that number 7 was not produced. Now, there is no question about it. It was not before your Honor.

The Court: And it was available?

Mr. Kayser: It wasn't available here. It was available from Australia, and we have a copy which we attached to our offer of proof.

The Court: I mean, it was just as available to you then as it is now.

Mr. Kayser: Yes, your Honor. I don't think there can be any question about that.

The Court: All right.

Mr. Kayser: I started to make another point here. What I wanted to do is show a rather interesting analogy between the conduct of this case and something which happened in the Zenith-RCA case which Mr. McConnell talked about so much, and which I would now like to refer to a little bit myself. And that is that in that case, originally in the amendment and supplement to the counter-claim, which is here in this case as plaintiff's Exhibit 43, Zenith in [114] paragraph 13 made certain claims for money damages against RCA, GE, and Western Electric—

The Court: Are you getting down to the five and a half per cent settlement? Is that what you are leading up to?

Mr. Kayser: No. I'm getting to a certain course of con-

duct which was involved in that case which appears here, which I think is very significant.

In that case, they asked for the period from January 14, '47 to January 1, '56. They asked for loss of profits from the sale of radio sets in England of roughly $1,460,000; they asked for loss of profits from the sale of radio sets in Australia for roughly $3,300,000. And the trebled claim of those two items came to over fourteen million dollars.

Now, when Mr. Wright got on the stand in this case—

The Court: I mean, were they able to import to England prior to '59 radios?

Mr. Kayser: No, sir. That's my point.

The Court: All right.

[115] Mr. Kayser: Mr. Wright, when he got on the stand in this case and explained so gleefully the ten million dollar settlement, explained that this was solely for Canada, because he said that during depositions in the Zenith-RCA case it had been determined that because, I believe he said, of currency restrictions, no radio or television sets could be imported into England or Australia regardless of the pool. He said that accordingly they then, in the settlement, claimed money just on account of interference in Canada.

But the interesting thing, your Honor, is this, and that is that if Mr. Wright testified correctly, then Zenith made these claims against GE, RCA and Westinghouse for over fourteen million dollars without even having checked to see whether or not they could have sold their sets in England or Australia. They came in with a claim for fourteen million dollars and they didn't even check the facts or, on the other hand—

The Court: Who was it that developed this in the trial of the RCA case?

[116] Mr. Kayser: That apparently was developed on deposition. Mr. Wright said it came out on deposition.

The Court: I assume it was a deposition taken by counsel for the defendants.

Mr. Kayser: I assume—your Honor, here they made this claim for fourteen million dollars plus, and they hadn't even bothered to see if they had a claim or, on the other hand, if they knew about these restrictions—well, that would be a great deal worse. But now the analogy—

The Court: The ad damnums don't mean much, you know. We get claims for $100,000 and we settle them in the back room for $1,500.

Mr. Kayser: Yes. But, your Honor, I submit you shouldn't ask an ad damnum of five cents if you know you don't have a lawsuit, or you shouldn't make a claim for a lawsuit if you haven't bothered to check—even to your own satisfaction, you haven't checked the facts enough to find out whether you have any basis to ask for anything.

Now, the relevancy of that is this: It's bad enough, your Honor, for the giant Zenith here, first in television [117] and second in radio, and so forth, to tussle in the forest with RCA and GE and Western Electric, who are other large sized corporations. But when they do what they have done here, your Honor, I think really—I say in all sincerity, I think that for them to make this claim here, to make these claims, and to have done it by the back door without openly filing a pleading, gradually in the process of the trial to make this switch—maybe counsel should have caught it, and maybe he shouldn't, but to make this switch and try to get this kind of recovery when they don't have any basis whatsoever, I say that this is the use of the process of this Court for economic warfare. That is what it is, and I say that I don't—

The Court: Who filed the lawsuit?

Mr. Kayser: We filed a lawsuit for patent infringement, yes, and they filed a counter-claim, and limited counter-claim antitrust. And then they suddenly shifted into the other lawsuit.

But I think this is a very serious matter, and I think that

the propriety and the consequences of this kind of activ-
[118] ity really, really should be considered by Zenith management, because this is, your Honor—this is nothing but economic warfare. Why Zenith wants to do this, to this small corporation — maybe their patents are valid and maybe they aren't, but why this kind of activity should go on I don't know. I do not think it is justified. I do not think it is equity.

Now, your Honor, before we get to the subject of the—

The Court: I think maybe if we are getting to a new subject, we ought to recess for the day and start fresh with a new subject.

Mr. Kayser: Surely.

The Court: And this seems to be a good breaking point, in view of the fact that you say you are getting to a new subject. We will stand adjourned until 10:00 o'clock tomorrow morning.

(Whereupon, the hearing in the above-entitled matter was adjourned to 10:00 o'clock a.m. of the following day, March 31, 1965.)

[119] * * (Caption—59-C-1847) * *

Before Judge Austin,
Wednesday, March 31, 1965,
10:00 o'clock a.m.

Hearing resumed pursuant to adjournment.

Present:

Same as before.

And thereupon the following further proceedings were had herein:

[120] The Clerk: 59 C 1847, Hazeltine v. Zenith.

Mr. Kayser: Good morning, your Honor.

The Court: Good morning.

Let me say, for the benefit of counsel, that we will go until 12:30 and start at 2:00, but at 3:00 o'clock there is a judges' meeting. This is for the purpose of determining your time for the day. At 3:00 o'clock there is a judges' meeting, so that the afternoon session will conclude earlier than normal, but you are not limited to today, if you don't want to be. I thought I would give you what the schedule is for today.

All right. Will you proceed.

Mr. Kayser: Your Honor, there has been a development in this case overnight.

McDermott, Will & Emery is general counsel for Hazeltine Research, and accordingly we requested them, in connection with our work here, to check with counsel overseas to find out what the facts were on the matters of tariffs, taxes, embargoes, and things of that type.

The Court: In regard to England and Australia?

Mr. Kayser: And Australia.

And, your Honor, the firm that they have consulted [121] and been consulting in Australia is the firm of Blake & Riggall in Melbourne, one of the leading firms in Australia.

Mr. Charles Hussey of the McDermott firm received a phone call last night, 12:30, as I understand it, reporting on the existence of an embargo in Australia against the importation of radio and television sets until February, 1960.

Now, we, of course, have not had an opportunity to further verify this—

The Court: Well, I mean, there is a—

Mr. Kayser: There is a proviso that if sets were inported during the period of July 1, 1950, to June 30, 1951, that then there could be further imports prior to February 1960, but, your Honor, in this case it is quite apparent that Zenith does not come under this exeception, because Mr. Wright testified that in the RCA-Zenith case it had been determined that up to that time they could not import. That time was within the period referred to in this phone call. So they knew in 1957 that they could not import, that they were not under this exception. They must have known it since that time and yet we find, your Honor, that in [122] their demands in this case they have asked for alleged loss of profits for the year 1959 based on 1.562 per cent of the Australian television market and 1.284 per cent of the Australian radio market for the year 1959.

Now, your Honor, we did not learn this earlier. It did not—we have not been able to verify it. We believe it to be the fact, but I may say, I may remind your Honor, that it is Zenith who has made the claim here. It is Zenith who should not be before this court asking for damages until at least it has ascertained the facts adequately so that it has at least a basis for its claim.

The Court: Yesterday, your position was, in regard to Australia, that there never was a ban on importation.

Mr. Kayser: I said, your Honor, that there was not a —since 1951 there had not been a ban on importation so far as—

The Court: As the cartel or pool.

Mr. Kayser: Yes, your Honor.

And, of course, under this regulation, if there were companies who had been importing from the period of '50 [123] to '51 they could continue to import, but Zenith is not one of those.

The Court: All right.

[124] Mr. Kayser: So I submit, your Honor, that we have here evidence which upon confirmation would make it clear that a portion, at least of the Australian damage claim, could under no circumstances stand.

Now, your Honor asked me yesterday a number of questions—

The Court: You have been reading the transcript.

Mr. Kayser: Well, in part, your Honor, and I also have been thinking things over as you might expect since 4:30. I would like to deal very briefly with a couple of them before I come to my next point which has to do with the statute of limitations.

The Court: You may proceed.

Mr. Kayser: Your Honor asked, as I understand it, that even assuming this 1957 settlement, which we offered to prove, and even assuming that the bar of that applies to our client here, why can't Zenith take the position that except for the acts of the pool, it could have between the September '57 period and May of 1959 built up its markets [125] through the theoretical—

The Court: I remember the questions.

Mr. Kayser: Yes, yes. Now, your Honor, the answer to this question and the issue here is, of course, a question of fact. This is not a question of a legal theory or legal abstraction. The question is whether as a matter of fact

Zenith has any basis for saying that except for the alleged acts of the pool it could have, between September, '57 and May, '59, have broke up, for example, to a 15.6% on television in Canada.

Now, in considering that, it must be remembered that the testimony of Mr. Wright as to what had occurred in the United States where, for example, he said Zenith has 15.6% of the television market—that that testimony of his was based on the fact also that Zenith had been producing and selling television sets in the United States since roughly 1948. In other words, this 15.6% of the American market represents the result of some 11 years of tilling the soil, of marketing, of advertising, improving, and so on, and so on.

[126] And that in the case of radio, where apparently the testimony is that by May 22, '59, Zenith had roughly 13%, a little less, of the American market, this represented the result of marketing, sales, promotion, and so forth since 1923, way way back in the distant future, almost four decades ago.

So Zenith in the United States came to the point where it was on the basis of over thirty years in radio and on the basis of over a decade in television as of May, '59.

So, then, the question is, would there be any justification, is there any basis in fact for supposing that Zenith could do a comparable job in Canada between September, 1957 and May of 1959, but for the claimed interference of the pools, or whether they could do a comparable job in England and a comparable job in Australia. Is there any baisis for believing—

[127] The Court: Well, of course it is your position, as I understand it, in regard to England, that the government barred any importation prior to June of '59.

Mr. Kayser: Yes, yes.

The Court: So stay with Canada where magazines and

advertisement isn't barred at the border, and does flow across and is a source of sales, I imagine.

Mr. Kayser: Yes. I think, really, we can forget about England and we can forget now about Australia, because it is clear on the record that there was no basis for this contention, because the act of the government in both countries is the thing that prevented them from getting to this percentage of the market by May, 1959. It was the government that kept them from doing anything. So I think Canada is the proper testing ground for this proposition.

Now, in the case of Canada, your Honor, looking at the facts now, not at some theory of what you could do between September of '57 and May, '59, we find first from Zenith's own annual report for 1957 that it was then that they started to make their plans; they started to locate distributors, and find out and do all the things that Zenith had [128] to do in the United States, starting with '48 in television, starting in '23 with radio.

They started in late '57 to get together and distributor organization and so forth. And by their own admission, in their findings of fact, it was not until late in 1958 that Zenith actually got to the point in Canada—this is Finding 30, your Honor—got to the point in Canada where Zenith began late in 1958 to export to and sell in Canada its radio and television products through its Canadian subsidiary. In other words, your Honor, not as a matter of theory, but as a matter of fact, after the '57 settlement, they did not get started in Canada—the normal routine of getting started took them until late 1958.

And we find then—we find then that according to their testimony, by May 22, 1959, or June 1 I think is the date they chose, they had acquired 2.6 per cent of the television business in Canada. And their annual reports show that with this late '58 start, they proceeded well. Their sales

were encouraging and they were happy; they were outstripping the industry trend and all that sort of thing [129] until '62, when the tariff was raised and their sales were affected.

So we say that it is clear, not on the basis of some legal theory—it's clear on the facts that Zenith is in no position to claim that but for the acts of any pools between September, '57, and May, '59—but for those acts they would have had 15.6 per cent of the television market and these other percentages.

In Canada, their performance was all they could expect from that starting point.

In the other two countries, the evidence is that the law interfered with their beginning at all, and they certainly cannot expect to collect damages from Hazeltine because the governments of those countries got in their way.

Now, another question which your Honor put to me was, assuming that these releases and assuming that Hazeltine has the benefit of them, is it not true that the continued existence of the pools after 1957 may be the basis of a damage claim. And I think the answer to that must be, your Honor, that the mere continued existence of the pool—that fact itself is not a basis for a damage claim. It is not [130] the basis for a damage claim whether or not the pool contains any restrictions. It is not the basis for a damage claim even though it is said that the pools took—

[131] Mr. McDougall: I beg your pardon, Mr. Kayser. I want to apologize for being late, your Honor. I have been tied up in Judge Will's court until now. I just got free.

The Court: We just heard about some law firm they had in England. All right.

Mr. Kayser: As I was saying, that the existence of the conspiracy does not go to the basis of release, even though

it was shown that the pool took action against Zenith. A claim for damages—

The Court: You will explain why, Mr. Kayser.

Mr. Kayser: Yes. Because, your Honor, a claim for damages can exist only if the plaintiff proves that he was in fact damaged. The statute gives release only so far as money recovery is concerned on the basis of damage.

For example, let us assume that someone is driving recklessly on the highway. He shouldn't be doing that. He can be criminally liable. He can be sent to jail for it. But so far as concerns the bystander, or so far as concerns another car, a driver of another vehicle, even though [132] these things may be wrong, he has no cause of action unless he can show that he was hurt.

The Court: I agree.

Mr. Kayser: For example, let's suppose that the cars even collide. But if the second vehicle has not been damaged, and if the second driver has not been damaged, even though there is a fact of collision, there is no claim for recovery unless damage is shown.

The Court: I agree.

Mr. Kayser: And that is exactly what we have here in the area of treble damage claims under the Sherman Act for antitrust.

Now, your Honor asked another question; namely, why wasn't the testimony of Messrs. Wright and Kaplan on this damage question—why don't we feel that that was proper and adequate.

Now, your Honor, on the question of damage there are two aspects, and this is very very clear in the law as it has developed. One aspect is, first, that the plaintiff must prove the fact of damage; namely, as in this automobile case, he must prove that his fender, so to speak, was in fact dented. And then, secondly, once he proves that [133] his fender was dented, then we get to the question of the

extent of damage, how much would it cost to fix it. But he must first prove that damage did in fact occur.

The Court: If you are going to stick with your PI case, why, there is also another factor—that any damage that did occur must be proximately caused by the person charged with causing the damage.

Mr. Kayser: Yes. And if a third party runs into the car, or in this case if the government of Australia runs into the car, the driver of the first car, reckless or not, is not responsible for what the third did or what the government of Australia did. And that is exactly the point we want to make.

And further, your Honor, when it comes to the question as to whether or not the fact of damage existed, this again cannot be a matter of speculation. Somebody can't be sitting in an office and not have knowledge of the facts and be the man who says, "Yes, there was an accident and A's car struck B's car."

[134] Sure, he can get on the stand and testify, but he is not the man who should be testifying. The man who should testify is the man who was at the scene, the man who has personal knowledge.

The Court: And in this case that would be who?

Mr. Kayser: I would say, your Honor, so far as concerns Zenith's proof in this case, that the logical people they should have called would be their export manager. Their annual report shows, for example, that in 1959 they set up a Zenith Sales Corporation which was in charge of both domestic and foreign sales.

Now, I believe their annual reports shows also that they have a man who is specifically in charge of export matters.

The Court: Wouldn't the sales depend upon the ability to freely export? And it is their contention, as I understand it, that they weren't permitted to freely export; so his opinion in regard to that, because of his being called

the export manager, I fail to see that that qualifies him under the alleged circumstances of this case.

Mr. Kayser: Certainly he would have more knowl-
[135] edge than someone not directly concerned.

But above and beyond that, your Honor, even the export manager testifying purely as a matter of speculation, of estimate, with nothing more than that, would not have a standing to prove this very serious matter here of creating liability.

The cases have said, your Honor, just as the Seventh Circuit said in the Park and Tilford case, that the testimony of the executive saying that but for these activities he could have doubled his profits, they said that won't do the job. There is absolutely no corroboration, there is no proof of any business loss, there is no question of any distributors lost. There is just his unqualified, unsupported statement. And the cases have said—well, here, I would like to read from the leading case in our memo here, the Story Parchment cases. It says:

> "There is a clear distinction between the measure of damage necessary to establish the fact that petitioner has sustained some damage and the measure of proof necessary to fix the amount."

Mr. Rathburn points out that in my quotation I [136] should have read correctly:

> "between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to fix the amount."

And the court says that when it comes to the matter of proving the fact of damage, this must be established by certain proof, and it is clear that although under some circumstances there is a liberality—

[137] The Court: How can there be certain proof under the facts of this case?

Mr. Kayser: How can there be certain proof?

The Court: Yes.

Mr. Kayser: There could be very easily certain proof if there is any, your Honor. That could be, for example, bringing in witnesses from Canada to testify, for example, that they had failed and refused to import a Zenith because this pool had said to them, "If you do, you will get sued."

The Court: Can't one draw an inference of that based upon the proof that was adduced in the case?

Mr. Kayser: No, your Honor, I do not see how that can be.

The courts have said that in this area where the—obviously the chance for speculation is so great, that there should be some exact, precise evidence.

After all, the plaintiff here is not engaging—should not be engaging in legal theorization but—

[138] The Court: Let's assume that they brought in one of these dealers who was threatened, who got a notice and was told that if he continued to sell Zenith's, why, he wouldn't get any Canadian products, and that as a result of that he didn't import any more Zenith products; on the basis of that, how would be come up with any figures on the percentage of the market that they might have had? How would that be helpful? It certainly might establish that he didn't order any more because of the warnings he received, but in regard to the figures and the damage question, how would that be helpful?

Mr. Kayser: Well, it would be some evidence as to the fact that some injury had occurred.

The Court: Is it your position that there is no proof of injury in regard to the Canadian market?

Mr. Kayser: Yes, your Honor, that is my position and their own records—

The Court: I did not realize that anybody would adopt that position in the face of the—

Mr. Kayser: Your Honor, the record is clear that after the settlement and by their own annual reports and by their own admissions their business did as well [139] as they could possibly expect. There isn't one scintilla of evidence to the contrary.

If your Honor, again, if he refers to the share of the market which they said they should have had and did not have, your Honor, that will, again—that is barred by the release. That then again comes under the point of statute of limitations, which I will come to in a minute.

The Court: All right.

Mr. Kayser: And so during the four year period in question there is no basis for any damage claim whatsoever. That is our position.

The Court: All right.

Mr. Kayser: This is as a matter of fact, your Honor. not a matter of legal theory. These are the facts.

The Court: But there could have been, if they had brought in a dealer who said, "I was going to sell Zeniths until I got threatened and then I didn't," that would have rectified the opening or the void that you claim exists.

Mr. Kayser: Well, that might be an overt act, but they would still have to prove, as in the case of the [140] car that struck the other, they would still have to prove damage. They might, to the extent of the profits that they could have made off of that dealer, but they still have to prove—in that case they would have to prove the extent of the damage.

Now, your Honor, this was their case. This was their theory. Your Honor asks what would happen if they had done that. This is their theory and their case and they did not do it, your Honor. Now, this is the record here, they didn't do it.

The Court: All right.

[141] Mr. Kayser: We have had a lot of ancient history, but we have had no history within this four years.

Now, on this other question, and you get past the question of the fact of the damage, as to the extent of the damage, the courts have been more liberal, particularly in those cases where it is said it was the act of the defendant which prevented the plaintiff from being able to bring in more certain proof. They say, in other words, when the defendant prevented the plaintiff from building up the market, or from creating facts or having facts which—

The Court: Isn't that the position of Zenith in this case?

Mr. Kayser: No, your Honor, it is not.

The Court: It isn't?

Mr. Kayser: That may be their contention, but it is not in fact their position. I mean, it is not the fact.

The courts have said that there will be a liberality—

The Court: Don't they say but for the pool we [142] would have been able to have obtained this per cent of the market, and by virtue of the pools agreement we are unable to supply any better proof than what we have. Isn't that—

Mr. Kayser: They are unable to supply any better proof than they have? Your Honor, they could supply a great deal more proof than they have and much, much better. There are a great many things that they could supply.

The Court: Don't tip them off in case we—

Mr. Kayser: They are aware of this, your Honor, they are aware of this.

The Court: All right.

Mr. Kayser: All they have done is that they have just put on Mr. Wright who gave a little general background and then guessed on Canada and England. He admitted he was guessing on England. And Mr. Kaplan got on the stand and more or less contradicted Mr. Wright on Eng-

land. And Australia, they just picked a figure out of the air.

Now, the fact of this type of situation does not excuse a party from bringing in the best evidence [143] that he can. It does not permit him to just speculate as he sees fit.

The cases point out that when there is difficulty in proving these things, then estimates may be used, but they should be the best estimates available, possible, and they should be based on all the evidence available under the circumstances. It should be based on the evidence available under the circumstances.

The Court: It is your contention that there was other evidence available?

Mr. Kayser: Yes, there were a great many things that could be considered which obviously were not considered. These men weren't qualified to consider it, didn't even try to. These are matters of the conditions in the market in dispute; for example, prices, relative costs and so forth. These were the men who were the authors of this screw driver story in England. Had they investigated the market conditions, had they investigated to see, for example, the kind of set that was needed—on the question of prices, [144] as we shall show later, they paid no attention, for example, in England to the question of prices

On the question of tariffs, for example, it is obvious that they paid no attention. Mr. Wright, for example, testified that he thought the Australian tariff was lower than twenty or thirty per cent, and as we show in our offer of proof the tariff is roughly—would be a hundred per cent.

In other words, they gave these estimates without actually any consideration of the market conditions in each country.

Your Honor, this should not be a question of theorization and speculation. This is the testimony than can end up in these tens of millions of dollars of damage. This

should be the absolute best, most thorough evidence based on the most thorough exploration possible, including such matters as market conditions, cost of conversion of sets, tariffs, embargos and so forth.

I submit that they should not come into the court and say, "Well, since the cases say that we can speculate, let's speculate." That is no basis for a judgment.

[145] The Court: Well, isn't there an obligation on the part of counsel to prepare for cross-examination such witnesses, and if they are as far off base as you say that Mr. Wright was in regard to tariffs and other matters confront him on cross-examination and perhaps destroy his testimony even as far as direct examination is concerned? Was that done?

Mr. Kayser: I think, your Honor, that it could have possibly been done much more exhaustively than it was.

But, your Honor, a lawsuit is not entirely, as the cases say, a contest of wits and, yes, there is an obligation on the part of the defendant—I mean the opposing party to cross-examine and so forth, but there is also an obligation on the part of the proposing party to see to it that he tells the facts, that he tells the truth, that he does not unconsciously exaggerate, and so on this, this is a two-way street, your Honor, this obligation of counsel on the parties. It is not a matter of "What can I get away with and not get caught?" There is an ethical, there is a legal and there is a moral obligation, if you please, that [146] both sides of a lawsuit—

The Court: Well, there is, you know—you haven't used the word and, of course, I won't make you use it—but underlying what you are saying is what is said so frequently in appeals in criminal cases, that they are where they are by virtue of incompetence of counsel.

Now, there a person's liberty is involved, and what do

the courts say in regard to this plea of incompetency of counsel?

They say, first, was he counsel of your choice rather than appointed counsel? And if he was, the courts say, in regard to keeping men incarcerated and depriving them of their liberty, that unless the trial conducted by counsel of the prisoner's choice was such a farce, such a fraud that justice would be horrified by the result, that since you are represented by counsel of your choice, why, agreed that he might not be the greatest in the world, but he was your lawyer and you picked him out. You are going to have to remain incarcerated for the balance of your term.

Now, how do we get around that analogy in this case? [147] Mr. Kayser: Your Honor, I think that in any lawsuit, and certainly there is a question here when we are moving to reopen—

The Court: They don't say to these prisoners, "Perhaps you could have had a better trial and might not have been incarcerated if your lawyer was top-drawer, but he did not do an intolerable job."

Mr. Kayser: Your Honor, what would the Appellate Court say if it could be established that there was some evidence in the case which was not true evidence and the prisoner's lawyer was not smart enough to catch it.

The Court: Well, it depends on whether it wasn't available to him at the time that it happened. You get down to your writs in the nature of a writ of error corum nobis where newly-discovered evidence may bring about a new trial on the basis that this knowledge was unknown to the defendant and to his counsel and could not have been known to him and for that reason, since it was not known and could not have been known, they are going to be given an opportunity to present it. But if this was available, and certainly in regard to whether you could [148] or couldn't import into Australia was available—

Mr. Kayser: You mean whether Zenith could or could not import?

The Court: Whether anybody could or could not import, based upon government blockades rather than cartel blockades, that certainly was available and perhaps should have been presented.

Mr. Kayser: By Zenith. Zenith has an obligation here, your Honor.

The Court: Well, I mean, I don't know that there is any obligation for anybody to try both sides of a lawsuit.

Mr. Kayser: He has got an obligation to try his own side honestly.

The Court: Do I have any evidence that they were aware of the fact, which you say is a fact, that—

Mr. Kayser: Yes, sir, we do, your Honor, and it is in this record. Mr. Wright admitted that in 1957 they knew they couldn't import into Australia. That is in this record.

The Court: Did he say that that could continue to be the situation in regard to any of the damage [149] period?

Mr. Kayser: Your Honor, isn't it reasonable to assume that they should check to see whether this had been removed, the restriction?

The Court: Don't we put any obligation on the adversary proceeding on the other side to prepare their lawsuit?

[150] Mr. Kayser: Yes, we do, your Honor. But we also put obligation on the part of the proposing party.

The Court: You have been able to find this out?

Mr. Kayser: Your Honor, we found this out in seven weeks, yes.

The Court: And I think this lawsuit was pending four years before it was tried.

Mr. Kayser: That's right. And Zenith had been in radio and television for thirty-five, forty years.

The Court: Well, let's go on with what you have to say.

Mr. Kayser: All right. Your Honor, I would, before I go to the statutes of limitations point I was coming to—I would like to comment, if I may, for a moment on your comment on the idea that this is not newly discovered evidence or evidence which could not have been discovered by both sides.

The Court: Yes.

Mr. Kayser: And the fact of the matter is that, your Honor, we are not before this Court on the basis of [151] a request to set aside a judgment, but rather to request this Court to exercise a discretion not to enter the judgment. And we are here on the basis—

The Court: And that is a distinction of some consequence?

Mr. Kayser: This is a distinction which the courts have recognized, your Honor; yes, they have. They have said that the court's power is not limited. This is in our memorandum of the cases on page 6 and following. They have said that it is clear that the court's power is not limited to situations involving newly discovered evidence.

They have said that the court has broad discretion to consider the individual circumstances of each case in order to do what will most advance the interests of justice.

They have said that a lawsuit is not a battle or a contest of wits; it is a fair struggle for a just decision.

They have said that the case may be reopened when surprise results from a change of theory, or when a material [152] issue has not previously been raised or adequately covered at the trial, or where for some reason important evidence has not been introduced at the trial.

The courts have also said, your Honor, that when there has been a change of position resulting in surprise, that even though opposing counsel—

The Court: We are on notice pleading here in the Federal Court and not common law pleading.

Mr. Kayser: Sir?

The Court: I say, we are on notice pleading here in the Federal Court, not common law.

Mr. Kayser: That's right, and we had no notice of this cause of action, your Honor. That is the point.

The Court: I mean, it may be due to somebody's inability to understand the English language, but to me it appears you have notice based on what I read to you yesterday.

Mr. Kayser: Well, your Honor, the courts have said that when the issues—the cause of action has not been [153] delineated, then even though opposing counsel should have objected, that if there is major prejudice resulting, that his client will not be held to suffer under those circumstances.

Now, I would like to go back, if I may—

The Court: Any direction you want.

Mr. Kayser: Thank you, sir—on this question of the statute of limitations.

Now, we have in our motion and our memorandum pointed out that under this theory of action which is in Zenith's findings, the fact is that their claim is barred by the statute of limitations on two grounds.

[154] The first ground—and it was the second one in our motion, but I will mention it first—the first ground is that to the extent that they claim loss of profit by reason of the fact that but for the pools they could have built up to these percentages shown by May 22, 1959, that that claim for damage is barred because the acts on which they rely occurred more than four years before the filing of the suit, and you cannot claim damage resulting from acts which occurred more than four years ago even though the damage may continue into the four-year period. The acts themselves must have taken place within the four-year period.

The Court: To put it simply, is it your position that there must have been an overt act during the period from May 22, 1959, to May 22, 1963? Is that your position?

Mr. Kayser: Yes, that is our position.

The Court: And the fact that there was a continuing conspiracy regarding which there were overt acts shown prior to May 22, 1959, is of no consequence?

Mr. Kayser: This is of no consequence.

[155] The Court: All right. Just so I get your position.

Mr. Kayser: Yes.

And the second part of this is that we say, your Honor, that there is nothing—there is no evidence in this record to show that any overt act causing the damage occurred within the four year period.

The Court: I think I have your position. We understand each other.

Mr. Kayser: Yes.

Now I would like to turn, finally, to Zenith's Exhibit 218.

The Court: It was on the floor the last time I saw it.

Mr. Kayser: Your Honor, I want to apologize for that. That was not planned. It was completely spontaneous, and I thank you for not taking me to task for it.

The Court: I just want to help you find it.

Mr. Kayser: It expressed my feelings.

The Court: I could tell from the brief that you didn't have much respect for it.

Mr. Kayser: This was not a staged thing. This just [156] came out. This was the way I felt about this exhibit.

Their claim on damage is really—this is a photostat, but this really—this group of papers is it.

As I said, we tried to figure this thing out, and I can understand why Mr. Dodds was somewhat flabbergasted, because we decided after considerable effort that we needed the help of some accountants. And if your Honor has or will have an opportunity to read the Ernst & Ernst report—

The Court: I have had it.

Mr. Kayser: They have some general characterizations of the thing. They say on page 22:

> "Taking the Zenith data in its entirety, it can be concluded that Zenith's employees did not have time to properly prepare the data underlying the cost aspects of the claim. It is highly doubtful that the general approach used in the claim or in this exhibit would be deemed acceptable by the Zenith management if data were assembled on which basic internal policies such [157] as producing new lines, and so forth, were involved."

Now, I am going to get to some specific shortcomings, but your Honor, this really is a very curious thing, I think, that we have here this claim which can result in over forty-eight million dollars. And this document was gotten together so hurriedly that it wasn't even typed.

Now, I recognize, your Honor, that the fact of typing of a document doesn't necessarily lend any weight to it. But the fact that these are just these longhand scrawls—and I can't even read some of the headings without help—this is a pretty clear indication that this was not a thorough, well-thought-out document and, frankly, I would be curious as to just how long it took to get this together.

[158] The Court: I would say that the proper time to make that inquiry is on cross-examination.

Mr. Kayser: Yes, yes. I agree, it would have been much better then. But let's consider some of the things that are in this document to see whether or not counsel, having been derelict or not—whether or not a judgment could properly be entered on the basis of this document.

Now, your Honor may recall that this document was primarily a putting together of figures as concerns Canada. And they used some cost figures involving the production of radio and television sets, and they used some sales prices

which they had had on sales of television sets in Canada. And between the cost and the sales price, that was the margin of profit. There is little—a few peculiar things about the cost figures. I will get to that later.

Well, in any event, when they took this thing over, or transposed this thing for the English market on which over nine million dollars or over half of the claim is based, they didn't even bother to use the English sales prices which were right in their own Exhibit, their Exhibit 216. [159] They didn't even bother to use those, even though these are English government figures. And even though those figures are lower, they didn't even bother to use their own export prices.

What they did, they just blandly went ahead and used their Canadian prices and the same margin of profit, and transposed it to their theoretical share of the English market, and they came out with the contention that if they had been allowed to do these things in England during these four years, they would have made nine million dollars, roughly, profits. That is the basis for the nine million dollars single, twenty-seven million dollars plus treble.

But the fact of the matter is, your Honor, that if they had been used the average English prices that the government statistics of England showed in their own Exhibit 216, the result would have been a loss, not profits of nine million dollars. The figure shows that if they had been exporting as they say during those four years, they would have [160] lost—they would have had a deficit of eleven million dollars. So their own figures—

The Court: I mean, it is your theory that they couldn't have sold Zeniths for any more than English sets were bringing?

Mr. Kayser: They certainly couldn't have sold them for so much more appreciably that an eleven million dollar loss would be a nine million dollar profit. I realize that

Zenith is the royalty of television and radio. I recognize their advertising but, your Honor—

The Court: I mean, they do sell at higher prices in this country than sets—

Mr. Kayser: Sure, sure. But, your Honor, we are dealing with reality. Sure, Zenith demands a premium; it does in this country, but it doesn't demand such a premium that an eleven million dollar loss would be a nine million dollar profit, your Honor. This is just completely totally devoid of all reality.

The Court: Is this eleven million dollar loss based upon selling it at the same price English sets were being sold for?

Mr. Kayser: Yes, yes.

[161] The Court: You don't think that is realistic either, do you?

Mr. Kayser: It's not realistic. As a matter of fact, all that Ernst & Ernst indicates is that on the basis of those English figures, that would be the approximate difference. But, your Honor, how can we ignore—how can we ignore a twenty million dollar difference? How can we say, well, the Zenith set would just automatically sell for that much more? And if it would, is there any proof of it? Is there any attempt to show that sets of this quality would sell for this fantastically higher price than the English market commands today? This would be sheer speculation, your Honor.

But the one thing that is not speculation is that using their Canadian figures, and the English average price, there is this enormous—absolutely enormous descrepancy.

[162] Now, this is one of the aspects of this Exhibit 218.

Actually, this suggests that the exhibit was gotton together so hastily that they just, because of a lack of time, didn't even bother to decide what the English situation would be.

And further, your Honor, in determining this spread, this nine million dollar profit and so forth, they didn't take any account at all of the tariff and taxes in England which, fine as the Zenith set might be, would further have raised the price sky high over the English set.

Now, to suggest that Zenith, with all its reputation and all—

The Court: I mean, there is no consideration of tariffs in this compilation?

Mr. Kayser: No, sir, not in the consideration. Oh, they talked about tariffs in talking about their share of the market. But in considering what the set would have to sell for in England, they did not consider it one whit.

The Court: I know that tariffs were certainly discussed, because that would be the first thing that would appeal to me.

[163] Mr. Kayser: It should be, it should be. And they talked about, on the stand—they talked about, well, we will get less of the English market because we understand they have got tariffs. But your Honor, have more than a share of the market aspect. They have a price aspect. Somebody has to pay them. The consumer does.

In this country, could a Zenith—does a Zenith set sell for twice as much as a comparable set? It does not, your Honor. And they would also—

The Court: Of course, they may resent the fact that you say that theirs is comparable, that they get—

Mr. Kayser: I know, I know. I'm not suggesting that they don't have a good set. I have one of my own, but that's nothing to do with this lawsuit.

The Court: That's right.

Mr. Kayser: I think we are talking about two different standards of conduct here. And the standard of conduct here is not what it should be.

Now, another thing that has occurred in this Exhibit 218

has to do with a device which has inflated the margin of profit considerably.

[164] Of course, how much profit there is in a set can depend on a number of factors. One is, what do you sell it for and what does it cost you. There is a question of a spread.

Well, Zenith—this Exhibit 218 came up with some profit figures, I believe—and this is rough; I believe it was in television, in 1960—this is just an illustration. They came up with a theoretical profit on the Canadian operation of around 4 per cent.

But then what their accountant proceeded to do is to say, well, a lot of these costs that are involved in getting down to 4 per cent are so-called fixed costs which wouldn't appear or be repeated if we increased our production. And, therefore, I will strike all those; I will compress the costs and, therefore, I will increase the profit.

And what he did by that means in one year, for example, he practically quadrupled the profit by removing costs from consideration, saying that they are fixed and that they should not be considered.

Now, the accountants have said—

The Court: Well, the costs of the plant are the [165] same, whether they push out 100,000 sets a day or 400,000 sets a day. The cost of the building itself doesn't change. It may take more labor, it may take more material, but there are some costs that don't expand, aren't there?

[166] Mr. Kayser: Well, you see, your Honor, the problem is this, and this is something I think we have to remember all the way through.

When we are dealing with facts, we should not theorize. We should determine what the facts are. It is not a matter of theory what might or might not happen. The question is, what did happen. And the accountants, as they show in their report, they have analyzed the exhibit. They have

also analyzed some Zenith annual reports. And they have concluded—this is Ernst & Ernst, one of the finest accounting firms in this country. I venture nobody will question that. They have concluded that the treatment of many of these items as fixed costs to be removed is not factually correct. It is not justified; it is not verified by the facts which are presented, which are presented in the exhibit and in the Zenith figures.

This, your Honor—this is not a matter of theory of how many sets you can build in a factory and what is more cost or not more cost. The question is, what is the fact.

Now, Ernst & Ernst—

The Court: But if you haven't done it, why, it [167] has to be theory.

Mr. Kayser: Sir?

The Court: I say, if you haven't done it, then it has to be theory. I mean, if you haven't put out another 100,000—

Mr. Kayser: No, your Honor. It does not have to be theory when you are doing it, when you are reaching your conclusions on the alleged basis of your own records and your own experience. Then the conclusions you reach should be consistent with your own record—

The Court: The facts, as I understand it, are things that have already occurred. And if you are contemplating something that hasn't occurred, it has to be theory. Maybe your theory is good or bad, but it has to be theory. It can't be a fact.

Mr. Kayser: Yes, your Honor. But when what you say you are doing is based on facts which have occurred, then what you say should be consistent and verified by those facts and not be contrary to them. I think we are entitled to that premise.

The Court: All right.

Mr. Kayser: Now, Ernst & Ernst have not pretended to be able to come to a final answer on a great many

[168] of these questions. They say that they would need to do a great deal more studying, get a great deal more information as Zenith should have had before it presented the exhibit. But they have pointed out to a number of very glaring defects, to a number of very glaring questions.

Now, according to their best estimate, that the way the Zenith accountants have played with this fixed cost aspect, that out of the total of $16,000,000 damages in the three countries, roughly ten million of the sixteen result from the fact they excluded as fixed cost items which should not have been excluded, items which would have decreased the profit.

They indicate, in other words—and this again is tentative because they don't have the underlying data—

The Court: Do they set forth what those items are?

Mr. Kayser: Yes, they do. And I am not an accountant. I am not a television expert. But, yes, they are in this report. So according to their best—

The Court: I mean, if you don't understand them, [169] you don't expect me to, do you, because I'm not an accountant either.

Mr. Kayser: Yes, your Honor. This is something which would need to be enlarged on by evidence, testimony.

The Court: I'm just talking about trying to understand what is before us, not—

Mr. Kayser: Well, the basic thing before us is the fact that they have treated and excluded as fixed costs items which are not in fact fixed costs if tested out against Zenith's own procedures and experience.

[170] So, in other words, of the sixteen million dollars claim, roughly ten of it could well be excluded right there. And that alone would drop it from sixteen to six, to say nothing of this English story which destroys—which takes a nine million dollar profit when, in fact, it ought to be an eleven million dollar loss.

Now, another thing that Zenith did in this Exhibit 218—you will recall that they decided their share of the market in Canada, for example, was on the basis of what they said their share of the U. S. market was. They said that the Canada market should be the same. And in deciding that they have 15.6 per cent of the American market, they took some industry figures and said, "We have a certain share of that; that's 15.6." But they didn't include imports in those industry figures, and there is some indication which we have not been able to verify that there are some other manufacturers locally who are not included in determining the total market. So, of course, if the market is greater than Zenith says it is, their share is proportionately less; a matter of percentage.

[171] Now, I'm frank to say I don't know how large this error is, how many mere hundreds of thousands of dollars difference it might make. We are talking in large figures here. But there clearly is an error. It does indicate an incompleteness and a carelessness in their compiling of what should be their vital figures, which is another step in discrediting this exhibit.

And on this failure to include imports, Mr. McConnell has been talking about the right to export, and properly so, but I gather that he doesn't want to recognize that the Japanese or the Germans or anybody import. He wants to ignore that when he figures his own share of the market here. I don't think he can properly do that.

Now, also in figuring these profits, alleged profits, as I pointed out, in deciding what price they could get, they haven't in figuring their profit margins—they haven't paid any attention at all to the question of tariff and taxes, and how that would affect the sales price. Certainly, if you are going to be reasonably competitive in a country, where you have to pay a 30 per cent tariff, and the domestic manufacturer [172] doesn't have to pay any, or like in Australia

where you have to pay a hundred per cent tariff and the manufacturer locally doesn't have to pay any, certainly you can't assume that you are going to be able to add all that onto the price and get the same margin of profit. You have got to recognize, if you are going to be realistic, that this will affect your profit margin, your spread. This is absolutely no recognition of that whatsoever in this exhibit.

Now, another illustration in figuring their margin of profit for Canada and what they could get for the sets, remembering again they have to be reasonably competitive, they have ignored entirely any question of selling costs or costs of getting into the market. This has been totally disregarded.

Now, it is true they are working through distributors, and maybe they think they haven't got any selling cost or import cost, but that isn't the case because their own annual reports for '58 and '59 tell their shareholders about the heavy cost of entering the Canadian market.

They said, for example, in '59 the continuation [173] of heavy cost in connection—they talk about the continuation of heavy costs in connection with radio and television receiver distribution facilities. And yet they don't take this into account anywhere in figuring out what their claimed margin of profit is, of Zenith and its subsidiaries. That isn't in the picture at all. It isn't in the picture in any of these countries. They just ignore that. [174] These figures are in a vacuum, your Honor. These figures are not related to reality, and I don't think they were intended to be related to reality. They were gotten together quickly, thoughtlessly, and without regard to the actual facts.

Now, there are a great many aspects where these figures are totally and woefully lacking in the solid accounting basis and background that they should be. The Ernst & Ernst report gives more detail on other points, and what I have given here is just an illustration. But I submit,

your Honor, that this Exhibit 218 really, with its incompleteness, with its carelessness, with its outright mistakes on the face, mistakes which are determinable after the thing is really studied—not quickly, not over a weekend as Mr. Dodds had—that these mistakes are so major and they are so pervading, I submit that this exhibit could not possibly be the basis for a judgment of sixteen million.

The Court: Of course, I am not going to suggest that you represent to me that Mr. Dodds over the weekend [175] didn't permit any accountant to look at this.

Mr. Kayser: He did, your Honor. He did.

The Court: Otherwise, why would he want it over the weekend?

Mr. Kayser: But your Honor, this is a matter of days and days. This is a very mixed-up document. This is not the sort of thing—

The Court: I would think that this accountant could suggest some questions to ask on cross-examination. There must be obvious flaws that, based on your high regard for the document, that this accountant could have said, well, ask him this, or ask him that, or did he take into account this, that, or the other thing which you now say are omitted.

Mr. Kayser: Yes, your Honor. I think it can be said that the cross-examination—that much more could have been done even in the short time available. But it is a fact that to really analyze this document takes a matter of weeks, not a matter of days, to really do the job. This was a big job, to try to understand what this document was supposed to be saying and doing. It was a big job.

Well, your Honor—

[176] The Court: Maybe this is a good time for a morning break.

Mr. Kayser: Surely.

The Court: All right. A short recess.

(A short recess was taken, after which the following further proceedings were had herein:)

[177] The Court: You may proceed.

Mr. Kayser: Thank you, your Honor.

We come now, as we must ultimately, and as we should, to the basic question of equity and justice in this case, which we have felt is the primary and paramount issue and the reason we filed the motions.

Now, your Honor has quite properly raised a lot of questions both yesterday and today as to why any relief should be granted here to Hazeltine when Hazeltine's counsel did not, during the trial or even ninety days later, in its briefing, or at any time before we filed our motions a few days ago, raise the questions which we raised in our motions and are raising—have raised here yesterday and today. Why weren't these evidentiary matters raised? Why weren't these objections made, and since they were not, your Honor says, in effect, "Should I not leave you and your client just where they are?"

Now, we must admit quite frankly that many of these things have been handled more efficiently, more promptly. We regret that they were not. We cannot [178] say, however, that some of these things which did occur might not also have occurred if we or any other firm was involved, but we do recognize that things did not occur as efficiently and as well, in some aspects, as they might.

Now, I referred previously, in answer to your Honor's question, to the fact that in asking for this admittedly extraordinary relief here that we are not doing so on the ground of newly-discovered evidence, that it is clear from the cases, it is clear from the Marconi case and all the other cases, that the power of the court to grant the relief that we seek is not limited to those circumstances.

We have also pointed out in our brief to the rule and the cases which say that even though counsel did not do

the job he should, even though he may have been somewhat derelict in not raising objections, maybe he wasn't as fast on his feet as he should have been, maybe he wasn't used to this kind of a trial of a case, but when major prejudice results that the law will not be heard to say that the client shall be made to suffer when the prejudice is major, when the effect has been in fact to deprive that party of his right to a fair day in court.

[179] Now, there is one other aspect, too, I think that your Honor really ought to consider, and that is that this coin has two sides; we have our side of the coin, but let's turn it over and let's look at Zenith's side of this coin.

Now, the fact of the matter is that the cause of action which Zenith now asserts and which is in its findings could have been pleaded by Zenith in April of 1960 when they filed their answer. This theory of damage by reason of the acts of these pools, this theory of inability to enter the markets in these countries, this theory of loss of profits from the tour of markets and all that sort of thing beginning in May of '59, this could have been pleaded in April of 1960, or almost four years before this case went to trial.

[180] The Court: Maybe the explanation of that was that in April of 1960 there was only a patent lawyer on the other and not a—

Mr. Kayser: Well, I have no knowledge of that, your Honor. I do not believe so. I understand that Mr. McConnell has been general counsel of Zenith since long before that.

The Court: I am talking about the names on the briefs.

Mr. Kayser: Well, I can't answer that, but the fact is that this cause of action could have been pleaded four years ago and it was not. Instead they came along in May of '63 with this very limited make weight counter-claim, which I think quite frankly was pleaded as an excuse to

keep in the case paragraph 13 of their answer. That is the reason for it, and they had to think up some basis of bringing it in so they said, "All right, we have got this lawsuit. We are charging now that by reason of these recent facts Hazeltine Research has used its domestic patents in this fashion and somehow this has some vague connection with our overseas operations."

[181] But the fact is that that is the lawsuit that they pleaded and, sure, they had all of these allegations of international conspiracy and so forth that your Honor has referred to. These are in his background as historical material, but these were not the acts which were charged as the things which caused the damage. And then it was not until during the trial, after we had the long Dodds affidavit and all of this testimony that suddenly, gradually this new theory starts to creep in, this new theory where we go back and try to recover again based on these allegedly wrongful acts many, many years ago.

The Court: I must assume, to go along with that, that counsel at that time didn't read the pretrial brief which clearly set out, prior to the trial, this theory that you were taken by surprise by during the course of the trial.

Mr. Kayser: Well, your Honor, as I say, I would also have been taken by surprise because I do not find that theory of action in Zenith's pretrial brief. The references to the international conspiracy I do not find as indicating that that was the claim for his damage action.

[182] The Court: You go ahead, and I will see if I can find it for you.

Mr. Kayser: Yes, sir.

Now, your Honor has commented, and I think quite correctly, that a lawsuit has got to come to an end sooner or later. There is no question about it. But in weighing the equities in this case, who is it, your Honor, that has caused this delay? Yes, Hazeltine possibly should have

objected during the trial and possibly the counterclaim as pleaded would have been dismissed. Possibly your Honor would have said, "Zenith may amend and we will adjourn for further discovery. We will let Hazeltine file its affirmative defenses," as we seek leave here to do. But there, again, would have been a delay caused by Zenith.

What if Hazeltine had raised this thing three months—when it finally saw the theory in Zenith's findings, there again would have been a delay caused by Zenith; and, so, although we acknowledge the fact of a delay, the fact that things were not handled as well as they would be, we suggest that the real delay, the major delay, and the major dereliction of duty here rests on Zenith, not [183] on Hazeltine. If that is to be the basis of weighing a decision, your Honor, we say that by far the greatest fault rests on Zenith and not on Hazeltine. I mean, if that is to be the basis of a decision.

[184] The Court: Let me call your attention to page 58 of the pretrial brief, which after going into the question of pools and that sort of thing they then summarize under a heading. "The Conspiracy Issue in the Instant Case."

> "As shown above, the Zenith counterclaim asserts a conspiracy between the Hazeltine Company and a large number of foreign companies wherein and whereby the inventions and patents of the conspirators have been pooled and the participating conspirators have then agreed not to license the pool patents of any of them in any manner that would permit exports of radios or television sets from the United States to the respective countries in which the pools are created."

Now, if that isn't a red flag, isn't it a little bit of a pink flag as to what the evidence is going to be in the trial of this lawsuit?

Mr. Kayser: Your Honor, it might be a little bit of a

slightly pink flag as a matter of Monday morning quarterbacking. I say that respectfully, but—

The Court: Except that this is before the football [185] game even started. This is before any evidence was adduced.

Mr. Kayser: Yes, as a matter of Monday morning quarterbacking you say now, "Now that the evidence is all in, now that the findings are in—" possibly this should have alerted him a little bit.

But, your Honor, there isn't anything in there which said to Hazeltine, "We are abandoning our theory that the acts which caused the damage were the pendency of the suit and the threats of infringement."

Your Honor, all this talk about international conspiracy and so forth, that was all in the counterclaim as pleaded. That was all in the background. That was all in this Paragraph 13 which they strove to retain by filing the counterclaim in the first place. That is nothing new.

The Court: Don't you think that any lawyer reading that would anticipate that it was within the realm of possibility that some proof might be offered in regard to damages suffered by virtue of failure to permit exports to these countries from the United States?

Mr. Kayser: Your Honor, you said just a few [186] minutes ago that we proceed on the basis of a notice pleading.

The Court: Yes.

Mr. Kayser: This is not notice. The notice is in the counterclaim.

The Court: I know. And do you want me to read that portion of the counterclaim upon which this is based? You will find that on page 68. I am reading from 58.

Mr. Kayser: I am aware of that, your Honor.

The Court: All right.

Mr. Kayser: But this is not what Zenith counsel asserted as being the acts, the theory of damage.

Now, I submit, in complete defense of Mr. Dodds, that there was no reason on God's green earth why he should say, "Is Zenith changing its theory of action on me?" Because if Zenith wanted to change its theory of action, they should have come in and asked leave to amend.

The Court: I mean, if this is pure surplusage he might also have come in and made a motion to strike this nonsense from the counterclaim which has no—

[187] Mr. Kayser: I believe he characterized it as such

A motion to strike, your Honor, you know that courts normally say, "We will leave it in. It won't do any harm."

The Court: Well, I never got a chance to say that. Nobody asked me to say that or permitted me to say it.

[188] Mr. Kayser: It is in as a fort of his theory as to why these are conspiratorial acts, the pendency of the suit and the other alleged acts of infringement. But, your Honor, we come then to another aspect, and that is this, and I think it is the final question, again putting aside for the moment the question of relative fault or dereliction of duty or what have you; the question I think this Court has to answer is whether having the knowledge of the fact that Hazeltine does have affirmative defenses to plead, having knowledge of the fact that Hazeltine did not have an opportunity to have discovery on this new theory of action, having knowledge of the fact that the Exhibit 218 is as faulty and untrustworthy as it is, having knowledge of the fact that there are in fact governmental regulations and embargos which actually overlap a part of the period of damage in England and Australia which would absolutely discredit the damage claims for those periods under any theory, the question is, can this Court, as an ultimate decision, say as a matter of equity that regardless

of all of these facts we must put them aside, we must [189] forget them and that this judgment must enter.

Now, your Honor alluded yesterday in one of his questions, as I recall, to—

The Court: I might have shortened this argument by not asking questions.

Mr. Kayser: Well, your Honor, I enjoyed it, so I am glad that you did.

—alluded to the instructions given to the jury, possibly sometime—I don't know whether it is usual, I doubt it—that in discharging its obligation to find the facts it should not be diverted from the truth by considerations of mercy, and I think—

The Court: Sympathy is the instruction.

Mr. Kayser: Sympathy, all right.

I think your Honor—at least I assume that he was asking, "Isn't that what you are doing, is asking that you ignore the facts—"

The Court: Did I get a reply to that or not?

Mr. Kayser: I propose to give it now.

The Court: Oh, I see. All right.

Mr. Kayser: And my reply is this, your Honor, [190] we don't consider that we are in the position of asking for mercy. We are asking for understanding. We recognize that the day is late. We recognize that our situation is a desperate one, and we recognize that there were things which should have been done which were not done. We admit it, but we do honestly believe that we are not asking for mercy, we are not asking for sympathy, we are asking this Court to make what I know is a very, very difficult decision, but a decision which we believe should be rendered in the interest of justice.

Now, that concludes my comments on the antitrust matter.

The Court: All right.

Mr. Kayser: I don't know what the correct procedure would be; I don't know whether it would be appropriate for me to make any form of an actual offer of proof of any of the documents in our offer of proof.

The Court: I think for the purpose of the record you might make an offer of proof in regard to those documents that you have handed me the last few days. I want to [191] be sure that you feel that your record is adequately protected.

Mr. Kayser: Yes.

I would like, your Honor, to make an offer of proof of the six items listed in our document, "Offers of Proof by Hazeltine Research, Inc., in support of Motion for Withdrawal of Findings and Conclusions, et cetera."

I would also like to make an offer of proof of the Ernst & Ernst report entitled, "Summary of Findings and Supporting Details in the matter of Hazeltine Research, Inc. versus Zenith Radio Corporation."

I should like to make an offer of proof on behalf of affidavit of Lawrence Dodds, executed March 18, 1965, together with the notice, motion, Crotty affidavit, and draft of counter-claim attached thereto.

I should like to make an offer of proof of the date of the affidavit of David Westerman, executed March 25, 1965.

All of these documents were filed with the Court last Friday.

[192] I would also like to make an offer of proof of the document entitled, "Excerpts from Zenith's Annual Reports" which was handed to the Court and to Mr. McConnell, including excerpts from those reports for the years 1957 through 1962.

I would like to make an offer of proof of the two page document entitled "United Kingdom Embargo" and of the copy of the Western Union Telegram from Mr. F. Standon of the Tariff Division Board of Trade, London, to Mr.

Charles E. Hussey, copies of which were handed to both the Court and to Mr. McConnell yesterday.

I would like to make an offer of proof of the one page document on the letterhead of McDermott, Will & Emery having reference to a telephone conference on March 31 with Mr. Niall of Blake & Riggall.

I would also like to make offer of proof of all of the Zenith Annual Reports which were referred to in the—

[193] The Court: Is there anything in them other than—of relevancy other than the excerpts?

Mr. Kayser: Well, excerpts and also as to evidence as to when they went into radio and television. But, of course, Mr. McConnell has the originals available, but I want to make it clear on the record that our copies, our complete copies are available for inspection.

The Court: All right.

[194] Mr. Kayser: Now, your Honor—

Mr. McConnell: Does that complete your offer? Does that complete your offer?

Mr. Kayser: I believe I offered the Ernst & Ernst report.

The Court: That is right.

Mr. Kayser: Your Honor, we also filed—this does complete my offer on this.

Mr. McConnell: Well, I want to object to all these documents on the ground that there is no proper foundation for them. They are out of order. They were not given at the trial of the case.

The Court: I don't know that you can object to an offer of proof. I don't know that there is any ruling necessary as far as I am concerned. I'm not receiving them as evidence. I think for the record, he is entitled to make an offer of proof, and that he has done. And his record, in my opinion, is adequately protected by virtue of that.

Mr. Kayser: Your Honor, there is the aspect of the other motion we filed having to do with the misuse issue. And as your Honor asked me, and as I acknowledged yesterday, this is an entirely different category. We [195] make no suggestions that anything occurred which deprived Hazeltine of the opportunity to make full proof. I am prepared to argue that. I wonder whether if your Honor has had the chance to consider it, and whether, if possibly—we think that our motion in brief covered the thing rather adequately. We argue no new aspects or points to add.

Now, I am prepared to argue, if your Honor would like to hear me on it. Otherwise, I rely on the motion.

The Court: I have read what you have filed. If you feel that that is adequately presented, there is no purpose of—if you have nothing to add, there is no purpose in reiterating or reading to me what I have already read.

Mr. Kayser: Yes. Well, we feel that does cover the situation, and quite frankly we have filed that because we felt that—

The Court: Isn't the question in regard to misuse a question of the sufficiency of the evidence and the credibility of the evidence rather than anything else?

Mr. Kayser: Yes. Really, we have two points that [196] we have pointed out; that the matter of coercion, again, is not a matter of legal theory but a matter of fact, and we have offered to show the specific licenses which others took under this formula which Zenith says is so coercive. The others were not in fact coerced. The others who took the licenses were much smaller—

The Court: Who was going to testify as to whether they were or weren't coerced?

Mr. Kayser: Your Honor, the fact is they weren't coerced, because they refused—failed to take the package which Zenith says was coercive.

Zenith says this package had the purpose and effect of requiring them and others to take the complete package. And we say that that obviously is not coercive as proved by the fact that we have all these other licensees who weren't coerced in any way.

[197] This again, your Honor, is a matter of fact. It is not a matter of abstraction—is a 15 per cent, 80 per cent, 100 per cent license coercive. That can't be decided as a matter of abstraction. And for that reason, we have offered to prove the licenses themselves.

Why we did that was, that the licenses were referred to more or less hastily and fleetingly as a part of the patent case, and they were not, as they should have been, brought specifically to your Honor's attention in connection with this question of coercion. That's why we make that offer.

The Court: All right.

Mr. Kayser: And also on this contention of coercion, because they said the $200,000 ceiling applied only if the entire package was taken—again, we are making an offer of proof of licenses where the ceiling is given without the entire package, which is evidence which was not and should have been—but was not offered to this Court. And frankly we have also reargued Mr. Crotty's—

The Court: Had they been offered, under what theory of evidence would they have been admissible?

[198] Mr. Kayser: As evidence that it was not Hazeltine's policy to deny the ceiling if you did not take the package. In other words, the proof of the pudding, your Honor, is in the eating, and that's why we would want to offer these—to prove that this was not the company policy.

The Court: That would fly in the face of some evidence that was adduced.

Mr. Kayser: Well, your Honor, as I started to say, we have taken the liberty of examining that evidence. Actually.

that evidence does not support the conclusion they seek to draw. Because all they had was, Mr. Crotty said he assumed the ceiling applied only if you took the package. And if you read the paragraph itself, and if you read his testimony, you can see that this was an assumption he chose to make for reasons that we suggest in the agreement—that, as a matter of fact, any normal businessman negotiating in good faith for a license, if he saw that paragraph and actually thought that it might mean what Mr. Crotty at Zenith said it meant, would have picked up the phone and asked. He wouldn't have said, "Well, I am going to assume that I can't get the ceiling except with the package." This isn't the way businessmen operate. [199] This again is an illustration of steering clear of reality. This is not a matter of an abstraction, your Honor. It is a matter of what are the facts.

Now, since I am this far, I will cover the last point briefly.

The Court: Very good.

Mr. Kayser: And that is this: The third ground for a finding of misuse here was the idea that if it was a misuse of patents, it would be a misuse of patents for Hazeltine to ask for a royalty on all sets, regardless of whether any patent was practiced or involved in the production of that set. In other words, it said that is an extension of the patent monopoly to unpatented material and, therefore, it's a misuse.

Well, your Honor, there is quite a line of cases which were not cited to this Court. One of two of them was cited on other points. But as we point out in our memorandum, there is quite a line of cases which indicate that that is not a misuse. Of course, it is another matter when you have got a question of forcing packages and so forth. But the idea that you charge a royalty based on the num-[200] ber of units that you make, whether or not the patent

is practiced in the process—that has not been held to be illegal and, as a matter of fact, there are two cases in this circuit which have approved this kind of set up. The American Secure-it case, which they rely on so heavily, has got the dictum in it which approves this kind of set up. They say that this thing is different. If this type of license set up is coercive—

The Court: Do you agree that it is?

Mr. Kayser: No, I don't agree, your Honor. Because the cases we have here in the Seventh Circuit, at least one of them, involved a case where the licensee was given the choice of this kind of license, and he didn't take it and he was sued for infringement. And the Court said this is valid. Now, what is more coercive than that, if you are going to use those terms, that he was offered this form of license, he didn't take it, and he was sued and he was held liable, and it was held that the patent was not misuse.

Well, that summarizes the substance of our other motion. And since we are in the process of making offers, while I do not have them here, I would like formally to make [201] for the record an offer to prove the license and license documents which are listed on our offer of proof attached to our memorandum in support of plaintiff's motion for withdrawal of findings and conclusions as to misuse of patent.

[202] Those are under the heading, "Magnavox, Sylvania, Warwick," which is Sears Roebuck, "Westinghouse, Welles-Gardner," for Montgomery Ward, "Packard-Bell, Curtis-Mathes, Setchell Carlson, Gianinni Control Corp., and Admiral." And, your Honor, that takes care of me until rebuttal.

The Court: Thank You.

Mr. Kayser: Thank you for your consideration, and I have enjoyed the questions.

The Court: Mr. McConnell.

Mr. McConnell: May it please the Court.

The Court: Counsel.

Mr. McConnell: Counsel has paid his high compliments to me and the way I handled this lawsuit, and he has paid his high compliment to his former counsel, and to my client, and to the accountants, and about everybody that had anything to do with this case.

Some of us are idiots, some of us are apparently dishonest. We don't know how to try lawsuits. We have to wait until counsel gets in the courtroom to find out how to do these things.

Now, he has assumed a pretty large burden. He started out to tell this Court that the evidence isn't as we said it was; that the pleadings aren't as they read; that nobody [203] knew what case they were trying. And in an attempt to make that argument, he has distorted the record and the evidence in this case so that I don't even recognize the case that I tried after listening to counsel speak. Now, that is a very dangerous procedure in this Court.

I have been trying lawsuits now for over 40 years. And if I may be permitted to say, I have never been before a Court with a finer clearer memory of what occurs in a courtroom, and what occurs in the presentation of evidence than in this one. And when counsel attempts to come here before your Honor and tell you things which you must know are absolutely not true, to tell you what happened in a lawsuit which he never had any participation in whatever, to criticize counsel, to criticize witnesses, to criticize litigant, and to assign ulterior motives to every action that is taken in this lawsuit, I say that man has a terrific burden in this Court.

His first charge is that I deliberately tricked Mr. Dodds, Mr. Diggins, the firm here, the McDermott firm, the firm down in New York of some 163 lawyers in it, Kenyon & Kenyon, and all the other lawyers that have had a part

[204] in this case. And that suddenly, one year after the case has been submitted to this Court, Mr. Dodds wakes up, obviously at the prompting of Mr. Kayser, and decides that all that time he has been surprised by my trickery. Not a word about it during all the time the case was under advisement; not a word about it when the proof was admitted. In fact, much of the evidence came in without objection.

This terrible document, 218, as I will show, came in without any objection at all. And the documents counsel throws on the floor were requested by Mr. Dodds from our accountant. They were his work papers, things that he had gotten up for his own use in preparing the exhibit. And Mr. Dodds requested them, and we brought them in pursuant to his request, and he used them in the cross-examination of Mr. Stevenson.

[205] It wasn't even typed, counsel says. Why, of course, it wasn't typed. They were his work papers. And that is the sort of trivia and piffle and misstatements we have goten all the way through this presentation, and I am a little bit annoyed by it.

I tried to honestly, in accord with the ethics of my profession, to present an honest case in this Court. And I have this Johnny-come-lately come in here now and tell me that all I was attempting to do was trick and bamboozle this Court. I think I have a right to be a little annoyed about that sort of a position.

And it was not only in this case that I misled courts and people. I had a case for Zenith involving a world-wide cartel where they stopped commerce between the United States and foreign countries, and every large corporation in this world practically was in it. And they had tremendous power all over the world to control the markets of the world and to divide them up. And Hazeltine was in every one of them. And he says that by some sort of lei-

sure demand, slight demand, I took that sort of a claim against all the companies in the world, naming three of the largest in my case, and they all came in for an unknown [206] lawyer represented by the largest law firms in the world—John Cahill, one of the leading lawyers in this country, Whitney North Seymour, former president of the American Bar Association, as fine a lawyer—this man doesn't even deserve to be in the same room with that man.

And they paid my client ten million dollars in cash, twenty-two million dollars in forgiven claims for royalties, free licenses all over the world, a total result accounting to some forty-five million dollars, and breaking up a vicious conspiracy which stopped American trade. And I am criticized in this Court for that sort of a result.

I thought I did something in that case which is deserving of recognition by the legal profession on the ground of enforcing recognized public policy in the traffic, in commerce, in the business of this country.

Those leading lawyers—Sir Hartley Shawcross is one of them, the man who had the Nuremberg trials for England, was one of them. According to counsel, he would have you believe they paid me all that money—my client all that money, with no fact of damage, anything—no damage done, he says.

[207] Men who knew more about the antitrust laws than this man will ever know looked at this case and settled it, and they settled it not because of me, not because of my trickery, not because of my client, but because they had no defense.

What does his client do? His client, fortunately for them, was not in that case. But they were named as a co-conspirator. They knew the result; they knew the facts; they knew what it was based on.

Mr. Dodds, pursuant to the order of this Court, came

to our office and worked and worked for days and weeks reading the evidence in that case—not only the evidence of the pools, but the evidence of the damage which the pools had caused to Zenith and other exporters. They went into this thing with their eyes wide wide open, laughing at the result.

Your Honor will recall Mr. Dodds telling your Honor that he was in these pools, and he was going to stay. And he was an official of this company, not just a lawyer. He knew exactly what those pools were doing. He knew exactly what those pools were attempting to do all over the world, and he knew the business motive back of it, and he as a patent lawyer knew that nobody—nobody could do [208] business in the face of the assertion of 5,000 patents against their distributors and retail outlets, and the company itself.

The threat of damages of those—we tried one patent suit here before your Honor. It cost us over $50,000 to try it. They alone have 500 patents in their portfolio which they can assert time after time after time. And they threatened that very thing, and they threatened it after this lawsuit was started. And the pool—and I am going to get to that evidence too. He just doesn't—he either doesn't know this or he is deliberately attempting to mislead a Court which does know the record. And I say that he has a tremendous burden.

[209] Equities in the case. A little bit of a company, he says, picked on by Zenith; an attempt to put them out of business. When the pool came down here after this—in 1959, within the damage period, he says there is no overt acts or anything. Within the damage period, McConnell comes down here—

The Court: Wasn't that ten days before the damage period, May 12th instead of May 22nd?

Mr. McConnell: Well, it was so close—

The Court: All right.

Mr. Kayser: The statute says four years.

Mr. McConnell: And that is the phoniest argument on statute of limitations that I have ever heard in my—

The Court: You will get to that later. I am sorry I interrupted. I just thought ten days might make a difference.

Mr. McConnell: Your Honor recalls that testimony. Mr. McConnell came down here and said, "You can't import sets up here in Canada. You haven't got a pool license."

And how do we get a pool license? He sends us the standard form of license. No license if you are doing [210] business except in one way—manufacturing in Canada.

No license to import. If we don't have a license, we can import and we get sued.

And about the same time, they send out a circular signed by the pool, all the people in it, telling the distributors and the retailers that if they handle sets imported without the license of the pool, they are going to get sued for infringement.

Now, how in the world do you do business in the face of that?

Oh, where is that big chart? You have got props all over the place. You had a big chart showing what we actually did, and what we said we could do free of the restraints, and he criticizes us because we try to do some business, and we did do some business in spite of all the restraints.

And the law, if I remember it correctly, is that you have to attempt to mitigate your damages. And we did, and we gave them credit for it on that terrible exhibit, 218. We gave them credit for every bit of business that we did up there, taking it off the damage computation.

All right. Now, let's go back to this trickery, chicanery of McConnell. I don't know. Your Honor read to him [211] part of the pleadings and part of the pretrial briefs.

The bible has a saying for it. There is nobody so blind as a man who doesn't want to see. This man is paid not to see. He can't admit that he can read this and it makes sense to him. He's paid not to see it.

Dodds saw it. Dodds, according to counsel here, is a much stupider man than counsel, but Dodds saw it. And I am going to read Dodds' remarks where he said he saw it. What is the thing they say we didn't tell them? That they didn't know how we were going to prove up the damages? That's the gravamen of the complaint, and from that everything else flowed.

We defrauded them; we misled them; we tricked them. They didn't know what we were going to prove, and they get into court and poor old Mr. Dodds, wandering around here in a fog all that time. He got pretty vituperated at times about me and everybody else. He came alive some of the time.

But here is what I told them I was going to do. Now, I don't have to take counsel by the hand and put him before a desk, and give him the pleadings, and say, "Read it." I don't have to do that. All I have to do is write it. And if they can't read it, that's just too bad. But that doesn't constitute fraud or trickery.

[212] What we say, page 46:

> "Zenith has been damaged. Zenith has been damaged by the Australian pool in its trade with Australia in the same manner as it has been damaged in its trade with England and Canada. Proof of such damages inflicted by Hazeltine's international activities will be adduced in accordance with settled principles of the leading cases on the subject. Bigelow against RCA Radio Pictures, 327 U. S. 261, William A. Rankin Co. against Associated Bill Posters, Grepke against General Electric Company, 289 F. 2d 508."

Now, I want to read what was adduced in the way of damage proof in the case of A. C. Becken Co. against Gemex Corporation, 278 F. 2d 1, 5, which is quoted in full in the Grepke case, and the William Rankin case quoted here was also quoted in full, and the William Rankin case was cited in my statement here of how we were going to prove these damages.

Here is the testimony:

> "In the light of forty-three years experience with [213] promoting similar lines of merchandise, plaintiff, after promoting the Gemex watchbands during the first full fiscal year ending January 31st, 1956, could reasonably expect a 50 per cent increase in profits for the next year ending January 31st, 1957, a 33% increase the following year, a 25 per cent increase the next year, and a 15 per cent increase in each of the two succeeding years. Also sustained were losses ranging from out-of-pocket cash expended in losses in closing out the merchandise the defendant had first agreed, and then later refused to take back. These losses total $56,007.95. In addition, $780.00 was a salary outlay for promotion of defendant's line at Field's, the benefit of which was lost when the cut-off by defendant halted further sales of its merchandise."

In other words, this man was cut off just like we were.

> "Plaintiff concedes that about two-fifths of this item [214] might be fairly deducted because of sales made during the two years of this promotion activity before the date of the cut-off. Total losses to plaintiff thus shown amount to $56,475.95."

Now, here is what our court said, the Court of Appeals of the Seventh Circuit:

> "We do not consider that the proof of damage offered by plaintiff were speculative in nature, and

that it is impossible to contend that plaintiff has been damaged by the action taken by defendant, as the latter contends. Rather, we think that there was no speculation as to the fact of actual damage and that plaintiff's business was seriously curtailed by the cut-off by defendant. It is not the law that the defendant who caused the damage can be permitted to escape liability because it is difficult for plaintiff to express in terms of dollars the damage it has suffered."

Citing the Rankin Case.

"This evidence, while purely an estimate and intro-
[215] duced as such, was proof of a kind as definite and certain as the subject matter admitted. It had to do with what was never actually earned because of defendant's wrongdoing. The witness testified from his knowledge of the business history, made his calculations upon what appears to be a reasonable basis and the defendants had ample opportunity by cross-examination or the offer of their own evidence on the subject to discredit him and show any fallacy in his reasoning or testimony."

[216] As I say, that Exhibit 218 went in without any objection whatever after counsel had cross-examined the witness who prepared it for two days. Then he asks leave—or in the course of it he asks leave to have time to have the exhibit examined by his accountant. And he brought in a Mr. Hart, who had been with Arthur Andersen & Company, certainly as good a firm as the one that they are talking about here, and he took the exhibit away with him and he examined it and brought it back and he further examined this witness with the obvious help of the accountant and then put the accountant on the stand to testify as to what was wrong.

Now, you can get accountants' opinions on accounting practice on any and every subject, and I have seen it done.

The Court: You don't need to belabor that subject.

Mr. McConnell: I know, just like expert testimony. They had an accountant. The point is they had an accountant who was reputable. They gave his qualifications. He had had the proper training. He had been with a [217] real first-class accounting firm and he examined the document in the time he requested of your Honor and which your Honor gave him, and he requested no further time. And he closed his cross-examination and was convinced as to the accuracy of that document and permitted it to go into evidence without one single objection. And that is the document which has no verity, no truth, nothing in it at all.

Now, talking about Monday morning quarterbacks, counsel brought up the subject of Monday morning quarterbacks, what he could do with a lawsuit after somebody else has lost it.

I want to leave this thought with your Honor before this recess, and your Honor, before you were on this bench, was an experienced trial lawyer. Some judges are not, but you were. There comes a time in the trial of lawsuits when a counsel has to determine which way he is going to go with his proof, which is the most, which is the least serious in effect upon his client's rights.

In this case, this whole defense was framed on the theory that there was no conspiracy, that this fellow McConnell was just dreaming things up that never happened. And he sat there and grinned and laughed about the idea [218] that there was such a conspiracy. That was his pitch. That was his line. That was the way he was going with the case, and he saw—and don't let anybody tell your Honor that he isn't an experienced trial lawyer, because I am going to refer to Kenyon & Kenyon's affidavit about

him in which they say that he is one of the most experienced antitrust lawyers in the United States. He had his choice of making a big play on the damage proof, which would tend to build up credibility of the experience existent. If there was no conspiracy there couldn't be any damages. Or he could concentrate on damage proof, and he chose, he made his choice, and now our second-guess brother here comes in as a Monday morning quarterback and says, "Knowing now what I know, I would have done it differently." He probably would have admitted the conspiracy, which the other man was denying—no, I don't think that is true because he said here the other day he was going to take advantage of our claim that he was in a conspiracy, but he was going to deny the fact.

That is the sort of decision, as I see it, that Mr. Dodds made, and I don't think it was such a bad decision at the [219] moment, at the time. To bring in witnesses from all of these countries, do this and that and build up the proof of damages, it immediately appears that the only thing in that lawsuit involved is how much, how much. I faced that decision many times in my trial life, as to whether to emphasize one branch of the case or another branch of the case, and he put his emphasis upon the fact that he wasn't in any conspiracy, and a blind man could see that he was in it up to his ears all the way through.

Now, you can say that he is no good as a trial lawyer, but everybody loses lawsuits. I have lost them, counsel has lost them.

The Court: And I have lost them.

Mr. McConnell: If that is the criteria, there is very few of us that can pass, I will tell you that.

I thought that Mr. Dodds did a very creditable job, although I didn't like Mr. Dodds. But I certainly would never criticise fellow counsel, preceding counsel, anybody that worked with me in a case to come in here and tell

this court that he is a doddering idiot and knew nothing about how to try a lawsuit of this kind and that I [220] misled him and tricked him and so forth.

The Court: Is it time to break?

Mr. McConnell: Yes.

The Court: I would rather listen than eat, but I assume that some people would rather eat.

(Whereupon a recess was taken to 2:00 o'clock p.m. the same day, Wednesday, March 31, 1965.)

[221] IN THE UNITED STATES DISTRICT COURT.
* * (Caption—59-C-1447) * *

Wednesday, March 31, 1965,
2:00 o'clock p.m.

Before: The Honorable Richard B. Austin, Judge.

Trial resumed pursuant to recess.

Present:

Mr. Victor P. Kayser, Mr. Hudson Rathburn, and Mr. C. Lee Cook, Jr., on behalf of the plaintiff;

Mr. Thomas C. McConnell, Mr. Philip J. Curtis, and Mr. Francis W. Crotty, on behalf of the defendant.

Of counsel for Defendant:

Mr. Dugald C. McDougall.

[222] The Court: You may proceed, Mr. McConnell.

Mr. McConnell: Thank you, your Honor.

Now, we have in this case an affidavit which was filed by Kenyon & Kenyon, attorneys in New York. I think they are the third largest law firm in New York, a very prominent firm, in which they sought to quash a subpoena that was issued in this case. And they refer to our affirmative defenses, paragraphs 12 and 13 of the defendant's answer.

Now, those were incorporated by reference in the counterclaim. And they say that those affirmative defenses are "a sham, and for the purpose of harassment of plaintiff in delay of the disposition of this case on its merits. Copies of plaintiff's interrogatories to defendant and defendant's answers thereto are attached to Mr. Dodd's affidavit for convenience of the Court."

And they say,

> "These proceedings follow an only too familiar pattern. The same or similar allegations of misuse of patents or a violation of the antitrust laws, or both, have been raised by similarly situated defendants in each of the cases listed below, and have been decided [223] favorably to plaintiff in every case."

And they cite the Hazeltine Research against Admiral, the Air-King against Hazeltine Research, Hazeltine Research against Automatic Radio, Hazeltine Research against Avco, Hazeltine Research against DeWald Radio. Each one of those cases was tried by Mr. Dodds.

Then we had also in this case a Mr. Diggins, and he has a long record of—

Mr. Kayser: Excuse me. Could we have the dates of those.

Mr. McConnell: Do you know the date of this affidavit?

Mr. Curtis: I will get it.

Mr. McConnell: Now, Bartholomew Diggins went to the bar in 1932 in the District of Columbia. He is an author of "Trademarks and Restraints of Trade," "Patent Practices Under The Antitrust Laws"—

The Court: I think you cited Diggins in one of your briefs.

Mr. McConnell: I guess I did. And he has been a special assistant to the Attorney General assigned to the Antitrust Division, Assistant Chief, Patent and Cartel [224] Division of the Antitrust Division, consultant to the Antitrust Sub-Committee of the Committee on the Judiciary of the House of Representatives, 1956.

Now, to tell your Honor that nobody in this case on their side knew anything about the antitrust laws—Mr. Diggins sat there through every minute of that trial consulting with Dodds all the way through. Dodds is an expert according

to Kenyon & Kenyon. He tried all these cases, won them all. But counsel would have you believe that he was just a neophyte and didn't know his way around the courtroom. [225] Now, I don't want to belabor a dead horse here, but the charge has been made that I didn't tell them what the case was about, and I think I would like to read just a short excerpt from my opening statement to show that I did tell them. On page 18 of my opening statement, I stated:

> "In England, litigation in England which would prevent any distributor—the proofs will show that our distributors, people we sought to distribute our goods, refused, couldn't distribute them, because of the threat they would be sued immediately by the pool if they attempted to handle any radio sets or any television sets produced by Zenith and put into Interstate Commerce." And inter-country commerce.
>
> "And there was no way in which Zenith could obtain a license from the pool, no matter how much they offered, or what they paid, because no license under the terms of the pool and the agreement of the license —no license could be issued which would permit the use of any patent or any invention covered by any patent in a set which was imported into Great Britain. [226] It was just as strong as that. There were no exceptions to it. You could not import.
>
> "And our proofs will show that as a result, the Zenith Radio Corporation, which is, the proofs will show, the first in television in this country in number of sets produced and sold, and it is a very close second to RCA in radio in the number of sets produced and sold, couldn't sell a thing."

Then there was a reference to damages. They didn't know what the damages of the proofs were going to be, and they were completely surprised, and so forth.

On page 26, I told them:

> "So that from a product standpoint, we were a competitor equipped to compete with the best there was in the world. And from that assumption, we will have expert testimony to show that we should be able to do in that market if we had ever been able to gain access to it. And, of course, our proofs in that respect fall within the realm of the rules laid down by the Supreme Court in the Bigelow cases, where a market [227] is completely destroyed, and where the parties that are in the conspiracy have destroyed it. That sort of proof is admissible."

Now, I don't know how in the world a lawyer could explain the theory of his case any more clearly than that. And they have told you about the damage proofs, and I know a little about the question of damages because I tried that Bigelow case. And I am going to get back to that a little later.

Now, Mr. Dodds filed an affidavit in this case, and in paragraph four of it, he stated—and this is the crux of their whole lawsuit. If this thing can't stand up, they don't get off the ground here.

> "4. That the theory of action of damages stated by Zenith in its proposed findings and conclusions came" to him "as a complete surprise, not having been stated in the counter-claim."

Well, it is stated in the counterclaim.

The Court: I mean, were those filed with your original brief, your original post-trial brief—your proposed [228] findings?

Mr. McConnell: Yes, yes, they were.

The Court: He had 60 days after those were filed to—

Mr. McConnell: To come in and say something about them. He never came in.

The Court: All right.

Mr. McConnell: But it was a complete surprise to him. He says in an affidavit sworn to in this Court—now, he is supposed to be an officer of this Court, and he is supposed to be responsible for his statements. And if he comes in here with a false affidavit, and that is the whole basis upon which their whole position is predicated, it seems to me that ought to put them in a position where they make no showing whatever to even get off the ground in a proceeding of this kind.

Now, they say he didn't know the damages, and he didn't know the time that we are claiming the damages, and he didn't know what it was all about.

I am reading now from page four of the plaintiff's post-trial brief which Mr. Dodds prepared—Mr. Dodds, Mr. Diggins, and Mr. Ruestow. He doesn't know what we are claiming. He doesn't know what the periods of damages—[229] he doesn't know anything about them. That is what he says under oath. Here is what he says in the brief to your Honor:

> "In the instant case, Zenith claims damages against Hazeltine which, trebled, amount to $48,716,616. This is for the four-year period from June 1, 1959 to May 31, 1963."

Then—that shows he knows all about the damages. Does he know anything about the conspiracy issue? On page eight he says, under the caption "The Issues Before The Court"—

The Court: I thought I read that.

Mr. McConnell: I guess you did.

[230] Now, how in the world can a lawyer, in the face of those statements, in his brief to this court, come in here and say that he was completely surprised to find out that those were the issues in this case. I don't think that any comment from me adds anything to the facts.

The man has deliberately falsified. It can't be true. He knew it. He knew exactly what this case was about. He knew it all the way through. You can tell that the way that he was acting in the courtroom in counsel's cross-examination. You could tell it from his statements about the conspiracy.

And the facts of damage which counsel talks about here we argued at length, at length before your Honor. That was his argument, there was no fact of damage. And we show how we were precluded, how we were importuned, how we couldn't get any licenses up there, and we went ahead with the patents we could acquire through litigation and did the best we could. That was all argued. There is nothing new in it. Your Honor read it and heard the evidence concerning it.

Now, this is not a new experience to me. In the Radio [231] Corporation case, RCA case against Zenith, and reading from page 3 of the transcript of December 13, 1964, they got beaten on a motion and so they hire a lot of new counsel and they come in to tell Judge Igoe that now they are going to—he is going to rehear how it should be tried, and then they got some new counsel. And he said:

> "That is right, but what I can't understand about this is this, this matter has been gone into fully heretofore, answers have been filed in these cross-complaints and now they are in the process of seeking discovery. They come in here with additional counsel and try to reargue the same matters over again."

And he says:

> "I think I understand what you are doing. RCA brought additional counsel and he wants to have these motions that they are not making. Other counsel have argued them heretofore."

And we went through that all the time during that case, get rid of one set of counsel—the Thomson office was in [232] it once and they were discharged and then Kirkland's office got into it—the same thing we have got here, you never get through. You try something and you get a favorable decision and a new crowd of lawyers comes in and wants to try it all over again.

[233] Now, as I say, that is the foundation of this claim, their surprise. They didn't know what they were doing. They didn't know what they were trying—and I don't believe it. They knew what they were trying. They knew what the issues were, and I think they did a very creditable job of trying those issues, considering the issues they had to meet.

Now, of course, they tried to laugh it off. They tried to say that it couldn't exist, it couldn't be so. It couldn't be this and it couldn't be that. But the evidence was documentary. There wasn't any real controversy about it. There was no way to contest that evidence. And, of course, the Court had no alternative but to find a conspiracy in this case.

Now, what do they say, if they can open this case up, what can they now accomplish that Mr. Dodds did not accomplish or could not accomplish? Well, let's take them up—I may not be just in the same order that they used—but let's take up first the question of the statute of limitations. I just read a quote from Mr. Dodds' brief in [234] which he understood that we were suing for the four years which he described as the damage period in this case.

The Court: Are you going to touch on the point raised, Mr. McConnell, that unless there is evidence of an overt act during the four year period that they are not entitled—

Mr. McConnell: I want to touch on it.

The Court: —that you are not entitled.

Mr. McConnell: Well, the first thing I am going to touch upon is that I remember a case that was in this court years ago which involved a fellow by the name of Al Capone, and he had some lawyers in here who represented him in an income tax fraud case and they did not plead the statute of limitations. And he got down to the penitentiary and he got another counsel and they decided that he should have pleaded the statute of limitations and they tried to reopen the case, and so forth, and the court held, and properly so, that the statute of limitations is a defense you can waive. You have got to assert it. You have got to plead it. You have got to plead it the first opportunity. There is no plea of a statute of limitations [235] in this case now or at any other time. They went to trial without any plea of the statute of limitations. There isn't any question about the law on that. If you go to trial or file an answer without a statute of limitations defense in it, you waive it. It is done with. It is gone.

But aside from that, there isn't any merit in it anyway; even if they pleaded it, it would not have made the slightest bit of difference. We are dealing here with a conspiracy which was designed, obviously designed, to control a market all over the world as long as the conspirators existed. It wasn't a conspiracy for this week or next week or this year, these license agreements were executed year by year, except for the Canadian Radio Patents Limited, and that was in perpetuity. And it stated its reasons, it stated what it was going to do, and it stated that you had to manufacture to get a license and if you didn't manufacture to get that license, you couldn't get off the ground in selling your products in any of those countries.

[236] Now, that conspiracy continued and does continue to this day, as shown by the evidence in this case. After the releases were signed Mr. McConnell came down here

and asserted all the patents in that pool saying that we have to have a license. He asserted a Phillips patent also, specifically a Phillips patent, and he asserted specifically the Hazeltine patent which was in issue and in litigation in this very case as a pool patent which would be asserted against Zenith in the event Zenith attempted to export its sets. And the thing that occasioned it was that we were exporting sets, and he came down here to stop it or to compel us to take a license from the pool which would have stopped it, because that license only applied to products which were manufactured in Canada and we were manufacturing our sets in Chicago, which we had a right to do, and ship in inter-country commerce under the antitrust laws.

We had in evidence here a folder that went out from that pool after this release was signed which notified distributors and dealers that if they took sets, exported them without the license of the pool, they would be prosecuted, [237] and it went all over the trade. And Mr. Wright wrote a letter protesting that, interfering with our trade and our commerce, and he got no reply. They attempted to assert it against Motorola, and we have that letter in evidence. There is no question but what that pool continued after 1957, no question at all. It was still continuing and still affecting—and intending to do that. That was the intention of the conspirators.

Now, if there was no need for this, if there was no need to prevent export by independent action, aside from governmental action, why the complicated conspiracy and pooling of patents of all of the leading electronic companies of the world?

Of course there was a need for it, and of course there was an intention to do it, and they did it. And those were acts which took place after the release in 1957 which showed that this was a continuing conspiracy.

Now, what is the effect of the continuation of the conspiracy? This is not a new issue.

The Court: What is your reply to his contention [238] that the 1957 release also released Hazeltine from anything prior to the date of the release?

Mr. McConnell: Well, any money damages which had accrued prior to 1957, if they were joint tortfeasor, which we allege that they were, would be released, but we are not asking for damages prior to 19—

The Court: You have answered my question.

Mr. McConnell: But not in the future, and I have got a case squarely on that. There is no question about it at all. You cannot release torts which arise in the future. It is against public policy and it is void. Nobody has ever argued a thing like that, to my knowledge, except—

The Court: Even though the release said from the beginning of the world to the end of the world?

Mr. McConnell: Yes. Well, it cannot be done. Just a moment's thought will show you that that is an absolutely ridiculous contention.

Now we had this situation up before Judge Igoe in the RCA case at to what was the effect of a continuing conspiracy, one that was alleged to be continuing.

[239] The Court: Of course, I don't feel bound by his reply to whatever the question was.

Mr. McConnell: No. I understand that. I don't think that you do, but in so far as Judge Igoe's opinions are well reasoned and thought out, the logic in them certainly would appeal to this court.

He says—and I am reading from 68,475 of the 1956 trade cases in the case of Radio Corporation of America against Rauland Corporation.

He says:

> "There can be no really serious argument over the point that a cause of action for damages under the

antitrust laws does not arise with the formation of an illegal conspiracy, but rather when the interests of the plaintiff are invaded by such a conspiracy so as to cause him loss and damages—"

Citing a number of cases—

"that being so each continued invasion of interest causing loss and damage is to effect a new cause of action and the statute of limitations begins to run when it occurs and as the above cases hold."

[240] Now, what he has held there—I don't need to go into the issue we had before him because it is a little different than here—but what he held there was that you can't start the running of the statute of limitations from the time the conspiracy was formed. And you don't have to go back and ask them each day whether or not the conspiracy has been formed. If a conspiracy is formed and it is acting against a business with the intention of controlling a business and is still in existence, the statute runs during the four years in which it is operating against that business.

Now, here is the four years against our business which are set forth in the counter-claim where that conspiracy was in existence.

Now, you don't get out of a conspiracy by the statute of limitations. You just can't get out that way. The leading case is the case of Hyde against the United States, 225 U. S. 347, 369, 56 L. Ed. 1114, 1127:

"Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until [241] he does some act to disavow or defeat the purpose, he is in no situation to claim the delay of the law as the offense has not been terminated or accomplished, he is still offending and, we think, consciously offending,

offending as certainly as we have said as of the first moment of his confederation and continuously through every moment of its existence."

[242] And then there is a companion case to that which has its application here in view of the argument that this is a little company and so forth. Well, it isn't a little company, it has got forty-seven million dollars of gross income a year.

But aside from that, it joined together with all of these mammoth companies who controlled trade all over the world. And what was the effect of that? In the case of United States against Kissel, 218 U. S. 601 the court said:

"A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan, this conspiracy continues up to the time of abandonment or success. A conspiracy in restraint of trade is different from and [243] more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but as a result of the agreement rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract but is a result of it. The contract is instantaneous. The partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes."

They have not abandoned this conspiracy.

Mr. Dodds told your Honor that he was in it and that he was going to stay in it, right in the courtroom he told you that. He never made any attempt to get out of it—as your Honor said the other day, RCA and General Electric, at the point of a gun, after they had been forced to pay

damages and had a government decree against them, they, in a sense, got out of the pool. They would license their patents independent of the pool and the pool advised [244] people to that effect. But nobody else did. Hazeltine didn't, and why, why, and how could they get out by the statute of limitations when they are continuing their illegal activity right down to this very moment? And we want an injunction enjoining them from continuing it so that we can get in that market?

[245] There isn't a case in the books, not one, which holds that a continuing conspiracy can be barred or sanctified or made legal by any statute of limitations. And the period of damage and the period involved in the four-year period is when we were prevented from exploiting and carrying on and conducting our business as we could in a free market. That is what the gist of this complaint is about, and I am sure that your Honor understands it.

So I say there is nothing to the statute of limitations. If they had such a defense, the time to have urged it was at the pleading stage of this case and not a year after the case has been submitted, and there isn't any merit in it anyway. He hasn't cited any cases in his brief or anywhere else that hold that a continuing conspiracy is barred by the statute of limitations for the period of damage prior to the complaint or the cross-claim which under the statute is four years.

Now going to the question of a release; now, here, there was a case where there was a continuance of the wrong and a release was pleaded, an attempt to bar future violations of the antitrust laws. The case is Westmoreland Asbestos [246] Company against Johns-Manville Corp., 39 F. Supp. 117 at page 119.

Here is what the court said:

> "If plaintiff's release is to operate as a complete defense, it must be shown that the intention was to

cover the defendant's subsequent misconduct, if such it was. Perusal of the instrument negatives any such view. The release spoke as of the date of its date. The contemplation of future wrong was not within the minds of the parties. Indeed, if the instrument purported to absolve defendants from liability from future violations of the antitrust statutes, I should hold it void as against public policy."

Citing the case of Raytheon Manufacturing Company against Radio Corporation of America, 1 Circuit, 76 F. 2d.

In other words, the parties could get together and obviate, negative the antitrust laws by agreement between themselves, and that certainly was never intended here.

[247] The Court: Well, it is your position that in view of the fact that the public is involved you can't give a release that will permit this to go on—

Mr. McConnell: Certainly, the public has an interest.

The Court: You do agree, I assume, that if the public hasn't an interest and this is something only between two parties on the release that it can be done?

Mr. McConnell: Well, if there is no public policy involved—

The Court: That is what I mean.

Mr. McConnell: But all torts are against public policy. This is a tort. It is more than a tort, because as your Honor well knows, the treble damage provision of the antitrust laws was put in there by the Congress to assure the protection of the public interest in a free market.

[248] By that device, by the private litigant enforcing the antitrust laws for his own protection, he has a deprivative, a fact—to protect the interest of the public.

The Court: I am aware of that.

Mr. McConnell: All right. So I say there is nothing to the release point. Now, there are one or two things that

they want to have your Honor relitigate here. They want you to open up and have you relitigate it all. And I most respectfully submit it has no merit at all.

Now, I want to go to another thing that a great deal of stress was placed on. Can I have that license, that Number 7 license?

In the offer of proof, and in the moving of papers here, counsel told your Honor that we have really flimflammed this court; that there was a license, License Number 7 in Australia, which from 1951 on created an open and a free market.

The Court: As far as the pool was concerned?

Mr. McConnell: As far as the pool was concerned. That everything I have been telling your Honor was [249] false; that they could get a license from 1951 on; and he comes in here and waves around License Number 7.

Now, if License Number 7 is examined, your Honor will see that it is identical with License Number 6 except for the date. And we produced License Number 6. We asked them to produce it, but they didn't produce it. We put that in evidence in this case.

And instead of showing that it gave a free license, it not only proves that that is not so, that that is a deliberate misstatement of fact, but it also proves the pool, and the conspiracy, and everything else that we have been talking about in this case.

The grantors in this license are Amalgamated Wireless of Australia, Standard Telephone and Cables Limited, N. V. Phillips, Glow Lamp Fabriken, Neutrodyne—Neutrodyne was the one that under agreement—as your Honor will recall, we put in the agreement—that all the licensing rights of Hazeltine, and they corresponded back and forth, and said, "Just don't put it in writing; we can have [250] our agreements without writing."

And they put all the Hazeltine patents in the pool—

Neutrodyne Proprietary, Limited, and Electric and Musical Industries, Limited, and Pi, Limited—there they are. They are the conspirators; they are the pool owners. They are the ones that created the pool.

Here is the next recitation:

> "And whereas the licensee claims to be a bonafide manufacturer of broadcast sound receivers and/or television receivers and/or radio gramophones, and as such manufacturer has applied to the grantor to grant, and the grantor has agreed to grant to the licensee a license under latter's patent and upon the terms and conditions hereinafter mentioned and in consideration of the royalties reserved and assessed upon, the basis agreed upon between the parties as being convenient.
>
> Now, therefore, it is agreed as follows."

[251] Now, in the agreement it is agreed—and a violation of this clause forfeits the license; they must put on each receiver they manufacture this caption in a plaque:

> "Number blank. This instrument was manufactured under a license granted by Australian Radio Technical Services and Patents Company"—that's ARTS—"in respect of latter's patent controlled by it for the reception in the Commonwealth of Australia and such territories as made from time to time be administered by the said Commonwealth of sound and televised broadcasts by wire.
>
> "Plates complying with the above may be obtained from the grantor and no such plate shall be removed from any broadcast sound receiver or television receiver or radio gramophone, or any other apparatus, without the previous consent in writing of the grantor, and no broadcast sound receiver or television receiver shall be or be deemed to be licensed hereunder unless

[252] such a plate be attached thereto, and the absence of such a plate so marked from the broadcast sound receiver or television receiver shall be conclusive evidence that the same is not licensed hereunder."

[253] They had to manufacture under that license, under ARTS patents in the pool, and the ARTS patents in the pool were for manufacture in Australia. They couldn't be anywhere else. They were Australian patents, and you have to manufacture in Australia to get that caption that went on your set. And if you didn't have it on the set, you had no license.

And counsel comes in here and solemnly tells your Honor that that is an open license to import into Australia. And that's of the same tenor, and of the same character of all the rest of his arguments here. We misrepresented things; we misled this court. This proves exactly what we said it proved, and we also introduced the components so that a man couldn't avoid this by components, by bringing in components and assembling them. There he had to show that they were licensed too, and he had no license to import any component at all. Never granted by the pool.

That's another thing they are going to prove up if a new trial is granted. And it proves our case; it proves the pool. It proves they were in it. It proves the Hazeltine [254] people were in it, and it proves they restrained and restricted the market, and there was no way we could do it.

What did we have to do—go and ask them each day whether or not the pool is open? They are all bound together in a contract not to give us a license except upon the specific terms which stopped the import of our receivers.

Now, what else have we got in this case? Those are three things.

The fourth thing is that we haven't any proof of dam-

ages in this case. I am going to need those other transcripts. I want the one of Henderson. Pardon me.

This thing approaches the ludicrous. I told your Honor this morning, the leading lawyers of the world paying us $45,000,000 when there is no damage, no fact of damage, couldn't discover any fact of damage—that's all in this record.

We had a man on the stand. We didn't put him on. He was put on by our opponents in this lawsuit, and he was put on to prove that we were way out in left field on this thing because this Canadian Radio Patent, Ltd. was simply protecting its patents under the Canadian patent laws. [255] And we haven't heard anything about that issue. And Mr. Henderson got on the stand and he couldn't stand up on cross-examination, as your Honor recalls. And it was perfectly apparent that the patent couldn't be construed that way.

But he did put in evidence that he had represented this pool in proceedings before a Royal Commission, and he read into evidence the following, and I am quoting from page 1111 of the transcript:

> "The portfolio in respect of which CRPL had the right to grant licenses consisted of 5,000 patents, and in the absence of a license from CRPL it is doubtful if anyone could sell in Canada a radio or television receiver."

A radio or television receiver: Not just a television receiver; a radio. This is their words:

> "CRPL indicated that it does not grant a license to any importer of radio or television receivers, except in the limited situation where the type of kind of [256] radio or television receivers sought to be imported is not manufactured by any radio or television receiver manufacturer in Canada. It is particularly in

respect of the policy of CRPL in precluding importers from bringing into Canada radio and television receivers that the complaint was made to this Commission."

Now, here is a Royal Commission holding that it is doubtful if anybody could import anything in the face of those restrictions. And if your Honor gives it thought, which you have already given, how could a little distributor or a dealer stand up against a threat of patent litigation under 5,000 patents? You are dead. You can't do it. You can't sell anybody under a threat like that.

[257] We established our own company up there, and we made a little progress with the limited patent protection we had, and we did mitigate the damages. But there isn't the slightest question in this world that that precluded export of radio.

Now, this is all in the argument. This is something we went over and over and over again.

Have we got the notice that they sent out to the trade? This pool sent out to all the trade—this is in the evidence in this case:

"Warning: Be sure your radio is Canadian made, is safe to operate, complies with the Canadian Electrical Code, is licensed under Canadian patents. Use of an imported radio means you are liable for damages, for infringement of Canadian patents."

And they have a special section:

"Infringement of Canadian patent rights: Only Canadian made, Canadian sold sets are licensed under the basic patents of Canadian Radio Patents, Limited. Use of radios manufactured and purchased outside the Dominion of Canada may constitute an infringement of Canadian patent rights, infringement of patent [258] rights, and naturally makes the owner liable to legal action."

That was run in all the papers up there, circulated among the dealers, and that was done after this so-called release. Of course there was an impact on our business. It was intended to have an impact on our business.

And all of this talk about not advising the Court of Tariffs and all that—when you read Mr. Wright's testimony and when you read Mr. Kaplan's testimony you see that they did take those things into consideration, and they did have knowledge of the factors which were involved.

Now, counsel—no matter what I do, it's wrong. I put on the witness stand here before your Honor the president of the Zenith Radio Corporation. He is the chief executive officer. He is familiar and supposed to be running the company. He's familiar with it; he is a brilliant man; he's had a tremendous success in business, and his company has had success under his management.

He told your Honor how he computed this, and the way it was gotten up, and it was the same sort of computa-[259] tion that was used in the RCA case, comparing our market with theirs. How else could you do it.

As your Honor pointed out in the argument this morning, they destroyed any other comparison. They intentionally destroyed it. They wouldn't let any set be imported. How in the world else could you do it. You can't compare a market which does not exist. You have got to take the best brains and ability you have in the business, and let them tell you what would happen if they were given access to the market free and unfettered from these illegal restraints.

Now, Mr. Wright wasn't a novice at this. He had been through the RCA case. He knew rules which are involved in computing damages; he knew the facts; he knew what his company had done. They are the first in television, and they are now the first in radio, I understand. They had comparable competition—the same companies that

they compete against here, their foreign counterparts are up there. The advertising goes across the two countries. The programs go across between the two countries. It was a comparable market, comparable in all respects except the restraint of trade, and those were created by my opponent. He was one of them.

[260] Now, I said that I had some knowledge of the proof of damages. I had a case years ago involving the Jackson Park Theater, and I don't know what I was supposed to have done wrong in that case, but I happened to win it before a jury. And it went up to the Court of Appeals, and the Court of Appeals listened to an argument like you have heard here this morning—that there wasn't any open market; because I couldn't compare what my theater had done with an open market, I couldn't recover any damages. And the Court of Appeals bought it. They destroyed the open market. And certiorari was granted, and the case went to the Supreme Court of the United States. And the Supreme Court, I thought, had written finis to that contention.

[261] The Supreme Court in the Bigelow case, 327 U. S. 251, said:

> "The jury may make a just and reasonable estimate of the damage based on relevant data and render its verdict accordingly. In such circumstances, juries are allowed to act on probably and differential as well as upon direct and positive proof. Any other rules would enable the wrongdoer to profit by his own wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous wrongdoing, the less the likelihood there would be of any recovery. The most elementary conceptions of

justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong create."

They don't want to have an open market comparison. They haven't gotten out of any conspiracy. They are in it with these people and have been all the time. [262] They don't even contemplate getting out of it, and they have destroyed the comparison which could be made if an open market existed.

We were precluded. We are talking about something now which they keep us out of. And the same thing is true in England. They talk about tariffs, they talk about restrictions, they talk about all that. That wasn't so, as he stated this morning.

I took that evidence over there. I know what the evidence was. You could get imports into England even during currency restrictions, by government permit. You had to apply, but that doesn't mean it was an embargo. There never was an embargo—never.

And the same thing is true down in Australia. You have to apply for a permit, or did up to a certain time. But that doesn't mean that imports are precluded. And if they were, why all of this machinery to pool patents, to use them, to cut trade between countries?

I submit to your Honor that there was a fact of damage which was so clear that nobody could misunderstand it. It was designed to damage any person in the United [263] States in the business of manufacturing radios and television sets. There wasn't any question about the fact of damage. Just like in the movie case, we couldn't get the pictures. The Court—why, of course, there was a fact of damage. That's obvious on the face of it. We couldn't get the product. Here we couldn't sell the product.

The fact of damage is self-evident and it is proved by the fact that the pool was still operating and is still

operating, and still acting to prevent this flow of foreign commerce between these states which this Antitrust Act says cannot be stopped by agreement between competitors. And the people in these pools were all our competitors.

Now, when we get to the amount of the damage, he has takeen this 218 apart and, of course, figures don't lie, but people that are not too respectable can use figures in any way that you want. And you can prove all sorts of things with figures if you use them this way, or that way, or the other way, and they aren't subjected to the proper analysis.

Well, just take one instance in his brief. He says that because we have a profit-sharing plan out at Zenith, that that's a cost, and that we didn't take that cost into [264] consideration in determining what our net profit was, because we had to divide up the profit. Now, that is a complete contradiction in turn. It's just like saying you would have to take out your income tax as a deduction in order to compute your damages. And the courts have dealt with that over and over again. That is something that is done with the money after it is earned. It is not a cost. And the accountant so testified, and there was no contrary evidence.

Now, they can get accountants to come in here and testify to anything, I assume—some theory; get a text book to say it ought to be this way, or that way, or the other way. But that isn't the record in this case.

The record in this case does not show any attempt to manipulate the figures, to torture exhibits. They were worked up and presented in good faith.

The question is raised about the accountant's work papers. They were his own work papers. They weren't prepared for this Court at all. They were produced here because Mr. Dodds said he wanted them for cross-examination, and he got them. And they were put in evidence. [265] But we are supposed to be charged with some negli-

gence or dereliction because the accountant's work papers got into the record in this case.

Now, the case which I read to you this morning, the Rankin case—exactly in point. There the secretary or treasurer of a bill-poster company was permitted to make an estimate of what he could have done if he hadn't been bared from the market. That was approved by the Court of Appeals in this Seventh Circuit. It is the law right down to date.

Now, there is one other question he didn't raise in his oral argument—

The Court: Maybe we ought to take that up in the morning, in view of the fact that I regretfully have to go to a Judge's meeting. This is much more interesting than what I will be doing for the next two hours, I assure you of that.

We will begin promptly at ten o'clock in the morning.

(Whereupon, the hearing in the above-entitled matter was adjourned until 10:00 o'clock a.m., of the following day, April 1, 1965.)

[266] * * (Caption—59-C-1847) * *

Before Judge Austin,
Thursday, April 1, 1965,
10:00 o'clock a. m.

Hearing resumed pursuant to adjournment.

Present:

Same as before.

And thereupon the following further proceedings were had herein:

[267] The Clerk: 59 C 1847, Hazeltine v. Zenith, hearing.

The Court: Well, we are ready to proceed.

Mr. McConnell: May it please your Honor.

The Court: Yes, Mr. McConell.

Mr. McConnell: I told your Honor yesterday in the course of my argument that there was such a thing as a waiver of the statute of limitations. I didn't happen to have a case with me at the moment, so I want to refer to the case of Wagner against Fawcett Publications, 307 F. 2d 400, which was decided by our Court of Appeals in 1962.

In there the question arose as to waiver of a statue of limitations and the court had this to say at page 412:

> "This record reveals, therefore, that Fawcett did not raise in any manner authorized by law the defense of a statute of limitations to the plaintiff's right of privacy action. Instead, by its motion to dismiss, it attacked the complaint on the merits, thus waiving the affirmative defense of the statute of limitations to the [268] right of privacy action."

Then the court goes on to say:

> "The raising of the defense of the statute of limitations as opposed to the time limitation in the wrongful

death act is a personal privilege of the defendant. If it fails to take advantage of that privilege in the manner provided by law, it is waived.

"Now, it was no concern of the district court, and that court had no right to apply the statute of limitations sui spondes."

There was no such plea made here. I don't think it has any relevance at all, but if it does, we certainly—the argument that your Honor should open up a case to permit the pleading of a statute which has been waived gets pretty far out into left field, I think.

Now, one of the difficulties with a trial of this kind of litigation and working in this field is, as I have found from personal experience, you are just like Alice and the Red Queen in Alice in Wonderland, you have to run so [269] hard to stay in the same place. And in their briefs here they have come up with a —not a new theory, it is not a new proposal, but they worked on practically everything they could think of, apparently, in the seven weeks and they have come up with the idea that since we didn't show that we demanded licenses in every period involved in this lawsuit that therefore we haven't shown an overt act and, therefore, we are not entitled to recover.

Well, not only do counsel work up new theories all the time in these cases, but they go back and resurrect theories which everybody would have a right to believe had been buried.

[270] Now, that particular theory—and they didn't mention it in their argument, and I don't know why they didn't but I have to answer it because it's in their brief, and I don't want to be left in the position of hearing it for the first time in the rebuttal. But that very question was raised in the case that I had in this Court, which I lost in the lower court. And counsel persuaded the trial court

that in the absence of a demand for a different playing position for a theatre that was a tenant of ours, that I couldn't have any recovery for a landlord. The landlord had leased the theatre under a percentage lease, and the theatre had been unable to get earlier pictures and was damaged. And, of course, the damage of the theater reverted to the damage of the landlord, and the landlord sued for a percentage run which he could have gotten in the absence of the conspiracy.

And the defendant took the position that since the tenant had made no demand that no cause of action had accrued to the landlord.

[271] Now, here is what the Court of Appeals—our Court of Appeals said about that in the case of Congress Building Corporation against Loew's, Incorported, 246 Fed. 2d 582, and I am reading from 595.

The Court said, and I am quoting on page 595:

> "In the alternative the defendants insist that because the plaintiff did not demand or request of any of the defendants earlier runs for its theatre plaintiff is precluded from claiming any damages. Although the parties have briefed and orally argued this point on appeal, the plaintiff proceeds on the assumption that the District Court did not reach this question. However, as we read the District Court's memorandum opinion, it appears that the District Judge was of the opinion that demand is a condition precedent. In so holding we believe the District Judge erred. The failure of the plaintiff to demand that defendants [272] refrain from their illegal trade practices could not legalize such trade practices nor immunize defendants against liability to those injured."

Citing the Kobe vs. Dempsey Pump case, and Ulrich against Ethyl Gasoline.

> "The defendants had a duty to refrain from acts in-

jurious to others and we know of no rule that states that demand is necessary in an action to enforce a liability arising from a tortious act. See generally, 1 Am. Jur., Actions Section 36; 1 Corpus Juris Secundum Actions, Section 27; 86 C. J. S. Torts, Section 51. Neither Section 4 of the Clayton Act, nor the terms of any agreement or undertaking by plaintiff with any of the defendants, express or implied, nor the circumstances of this case require a demand as a condition precedent to the maintenance of this action."

[273] Then they discuss the case which is cited in the moving party's brief here of Milwaukee Towne Corporation against Loew, and they say this about that case:

"We must confess that there is some language in the decision by this court in Milwaukee Towne Corp. v. Loew's, Inc., Seventh Circuit, 190 F. 2d 561, which lends support to the argument advanced by defendants. See also J J Theatres, Inc. v. 20th Century-Fox Film Corp., Second Circuit, 212 F. 2d 840; and see Vilastor Kent Theatre Corp. v. Brandt, and the T. C. Theatre Corp. v. Warner Bros. Pictures, Inc. However, as we read the Milwaukee Towne decision, the court did not hold that a demand was a condition precedent to the maintenance of a private antitrust suit. The case was tried on the theory of a refusal to deal, which is also true of the J J Theatres case, at least in part, and the court held properly, we think, that without a demand or
[274] request to deal there could be no refusal to deal. But that is not the case here."

Of course, the theatre made no demand for any product. The owner of the building had no demand for any product. Now, that is a later case than the Milwaukee Towne case. The Milwaukee Towne case, I do distinguish that because I was counsel in it, and it doesn't meet this point at all. I

don't think it is important, in view of the court having already distinguished it.

Now, the leading case on this, of course, and one that is very close to the one at issue here, is the case of Kobe, Inc. against Dempsey Pump Company. And there there was an aggregation of patents covering pumps, and there was a wide knowledege in the trade that there was this group of patents which were being utilized to keep people out to do business, and the court refers to that. This is 198 F. 2d; I am reading from page 424. The case is Kobe, Inc. against Dempsey Pump Company.

The court says:

> "Kobe gave wide publicity to the number of patents which it owned. An imposing list of patents was in a [275] conspicuous place in its catalogs, many of which had expired, and they were used to the limit in its attempt to stop Dempsey. The issues presented were issues of fact. The trial court found them against the plaintiff, Kobe. It found specifically that it was guilty of monopolistic practices in violation of law. On this record we cannot say that there is no substantial evidence to support the findings or that they are clearly erroneous.",

citing cases.

Then the court says:

> "There is no limit in the contention that defendants cannot maintain their cross-claim because Kobe did not refuse to grant a license to Dempsey upon reasonable terms. The proof was that such a license was never requested by the defendants and was never refused. No attempt was made to prove that such a license would have been granted had the request been made. In all the years which Kobe manufactured pumps, no license [276] was ever granted to anyone else and the licenses

which were reserved in original contracts were eventually eliminated by Kobe. When operating under the Roko agreement, licenses to others were prohibited unless consented to by Old Kobe. There is nothing here to indicate that a different policy had been adopted. The inference is that the old practice was being continued. Of course the refusal to grant a license or a willingness to grant one if requested might be a circumstance in determining whether or not there was an unlawful monopoly. It would not be controlling and would not be a defense if an unlawful monopoly actually existed."

[277] Now, they go on, on the question of damages, and they say:

"There was almost a complete boycott of their products. To hold that there was no liability for damages caused by this conduct, though lawful in itself, would permit a monopolizer to smother every potential competitor with litigation before it had an opportunity to be otherwise caught in its tentacles and leave the competitor without a remedy."

"The trial court found that the unlawful acts of Kobe induced a continual boycott of the Dempsey product and prevented sales by Dempsey and Specialty and caused substantial damage. In questioning the sufficiency of the evidence to sustain the award, two basic principles of the law of damages are presented: 1, the fact of damage must be established with reasonable certainty, Bigelow v. RKO Radio Pictures, Inc.," and other cases.

[278] "The amount of damages may not be based upon mere speculation and conjecture."

"We have no difficulty in determining that there is substantial evidence to sustain the court's finding that Dempsey and Speciality were damaged. Proof of the

attorney fees allowed is not challenged. The item of expenses"—

Then they go on with that, the items.

"The proof of this item was sufficient. As to the amount allowed for loss of sales, the evidence established that Dempsey had in operation an establishment to manufacture his pumps and auxiliary equipment. Specialty had organized a sales corporation headed by an experienced salesman in this type of equipment. He was a former District Sales Manager of Kobe. Salesmen had been employed and there were other competent salesmen available who were qualified in the field
[279] of selling and servicing the Dempsey product. There had been considerable experimental work and testing of the Dempsey pump but it was first introduced to the trade at the Petroleum Exposition in Tulsa late in May of 1948. There was advertising of various types in connection with this introduction. It is undisputed that before and after the Exposition great interest was evidenced in this new product by the leading oil producers in the Mid-Continent Araea. Specialty had called upon about 350 representatives of 40 important oil companies. In the month of June immediately following the oil show, Specialty made three installations"

—and then they go on and recite what they did. They say:

"The expanding market and the interest in the pump almost disappeared following the institution of the litigation and the notice to the trade."

Now, they say further at page 427:

[280] ". . . the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as

are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."

Then it says:

"Complaint is made of the method which the court used in computing the damage. In assessing damages the court used the difference in the sales price of the pumps and their direct cost, finding that the six pumps per month could have been manufactured without additional plants, machinery, tools or other capital requirements. The method used was approved in Bigelow v. RKO Picture Radio Pictures, supra, 327 U. S. at page 263, where it was said, 'the plaintiff sought [281] to show his damage by proof of the difference between the amounts actually realized from his business after the conspiracy became effective, and what, but for the conspiracy, would have been realized by it from sales at reasonable prices, the evidence of which was the amount by which his current prices were higher before the conspiracy than after, and by the extent to which the value of plaintiff's business property had declined after the conspiracy had begun to operate.'

"The losses by Specialty were computed at its contract price and were directly contingent upon the loss of sales of Dempsey."

Now, that was done by—the officials of the company, as to what they could have done if they hadn't been precluded by this wrongful activity.

[282] Now, we don't even have a case where there wasn't a demand, as there was in the Kobe case.

The evidence in this case shows that there were many demands by Zenith to be licensed in this pool to import their product.

The evidence in this case shows that that pool up there

in Canada was composed of the foreign subsidiaries of Zenith's competitors. They were all making radio sets with the exception of Hazeltine, and Hazeltine being in the conspiracy was charged with anything that anybody else did during the course of it.

But, by and large, they were using this pool to suppress competition in Canada, and the record here is replete with instances of where they circularized the trade, where they called the retailers in. They had meetings up in Toronto, as your Honor will recall. We had that all by documentary evidence. We had some minutes of those meetings, and how they were called and reports back and forth of what the pool was doing to protect Canadians from foreign competition in radio sets and television by using the threat of patent litigation against distributors, retailers and [283] other people in the trade.

Now, that all flowed out of an agreement between competitors under which they agreed not to license competitors who were bringing in sets made in the United States. And there isn't any question about it, it is all spelled out in the documents and there was never the slightest question in anybody's mind that that was done by virtue of a conspiracy and that it continued.

In 1958—I read to your Honor a circularization to the trade, the threat of patent litigation, and Mr. Wright wrote a letter up to McConnell, the head of the pool, and told him this was damaging Zenith's business. He wanted it stopped. He had thought that after we had reach agreement with General Electric and RCA that our problems would cease, but they hadn't and he wanted this stopped. And he wanted a reply to his letter and he got no reply.

Well, the next thing that happened, and Mr. Wright testified that our distributors were complaining, our distributors were having difficulty in placing the sets, that our distributors were met with a threat everywhere of

[284] litigation, and he said that under the Canadian law—there is no dispute to this evidence, it all went in without objection—that the sets would be confisticated under the Canadian patent laws. And he drew a perfect picture of what was happening up there, showing that any business man in his right mind could not afford to spend the money and the funds to do the kind of a job with the Canadian market that was being done here, and he said that they didn't do it for only one reason, because of the activity of the pool. And there is no contravening evidence to that in this record at all and no cross-examination on the point.

[285] I don't need to advert anymore, I think, to Mr. Wright's testimony. He was very thorough about it and he told how we computed the damages, that we were first in television, second or third in radio at that time, that he had transposed the markets of the one country to another and the results, that the competition was comparable, that the prices were much higher in Canada than they were here, and that the sets produced by Zenith were of better quality, better styling, and that they could compete against the same competition they had here. And there was very little difference in the competition and the programs across the line, the advertising across the line. All of that was background testimony to his competency, and he wasn't objected to as an incompetent witness, no such objection in this record. And his conclusions follow the Bigelow case as to the computation of the damages and showed that this thing was continuing long after the release that has been talked about here and right down into current times.

[286] Now, what happened after that, after Mr. Wright had taken this up with Mr. McConnell? Our distributor wrote us and said that they had been importuned by the pool and the pool wanted diagrams and wanted to

see the sets that we were selling to see whether or not they violated any of their patents in the pool. And we gave them the diagrams and they examined them and then Mr. McConnell came down here in 1959, June, I believe, while this lawsuit was pending, and he told Mr. Crotty that we were infringing on pool patents and that he wanted it stopped and that we couldn't have a license to import, we had to manufacture up there. And there was some discussion of how that could be done, and he sent a further letter with their form of license, their current license, which is in the record in this case, which shows that they did not permit importation. And at that time this case was pending, and in this case and a part of it—well, it was the whole day, the assertion against Zenith of a Hazeltine patent, the counterpart of which is in the Canadian pool. And the background was that here were members of that pool who had paid us, as I told your Honor [287] yesterday, the equivalent of some forty-five million dollars for past damages who obviously would welcome a chance to get their own back if it came, and here was a litigation which was going to establish the validity or invalidity of one of the patents the counterpart was in that pool. And I told your Honor at the trial that if we lost this lawsuit, so far as Canada was concerned, we were dead. And I think that I told your Honor that we could almost hear the rustle of the wings of the buzzards that sat and waited to see what was going to happen to Zenith so they could pounce on the carcass up there and take what business we had established away from us. And there was noting theoretical and there was nothing conjectural about it, we were engaged in a battle for our life in Canada and we still are.

[288] Now, what next happened?

Our distributor wrote us and sent us a letter that one of their other distributors handling Motorola products

had received. This is in evidence without any objection. This is from Canadian Radio Patents, Ltd., May 17, 1962.

Now, was the pool still operating or not? Counsel would have you believe that it wasn't operating, everything died somewhere back prior to the time we are talking about in this lawsuit. They weren't active any more. I suppose that is the assumption.

Well, the assumption under the law is exactly the other way, that once a conspiracy to control an industry starts, it continues until its object is achieved, and anybody in it has to show that they got out of it. And, parenthetically, not only did Mr. Dodds tell your Honor that he was not getting out of it, was staying in it, but he told your Honor the reason that he was staying in it was that that way he could get more bucks for Hazeltine. Well, that usually is the motive of most wrongdoing, is to get more bucks for the fellow violating the law, and he was frank enough [289] to tell you that was his motive.

All right, here is the letter. It went to Electrical Distributors, Ltd., who were handling radio products, Canadian Radio Patents, Ltd., Toronto, May 17, 1962:

"Dear Sirs:

"We notice from an item appearing in the press that you have been appointed a regional distributor to market in Canada home entertainment products manufactured in the United States and bearing the trade name Motorola.

"Canadian Radio Patents, Ltd. is an agency empowered to license the Canadian electronic patents of such firms as Phillips Electronics Industry, Ltd., Canadian Marconi Company, Northern Electric Company, Ltd., Canadian Westinghouse Company, Ltd., Canadian General Electric Company, Ltd., and Hazeltine Corporation. In addition, we own Parker patent No. 457, 328 entitled 'Television Receiver.'

"Addison Industries, Ltd., and Seabreeze Manufacturing, Ltd., which made Motorola products in Canada [29] was each licensed by Canadian Radio Patents, Ltd. Although we have not, of course, had an opportunity to examine the circuits of any home entertainment products which you intend to market in Canada under your arrangement with Motorola, we would strongly suspect that television receivers would incorporate the inventions, of at least the above-mentioned Parker patent and also Armstrong patent No. 441,777. FM radio receivers would almost certainly use the latter patent also.

[291] "A close analysis of these circuits would probably disclose other inventions covered by patents which we are empowered to license.

"Section 672b of the Canadian Patent Act stipulates that the exclusive rights under a patent shall be deemed to have been abused if the working of the invention was in Canada on a commercial scale and is being prevented or hindered by the importation from abroad of a patented article by the patentee or by persons claiming under it, or by persons directly or indirectly purchasing from him, or by other persons against whom the patentee is not taking or has not taken any proceedings for infringement.

"Subsection 3 of the same Section states it is declared with relation to every paragraph of subsection 2 that for the purpose of determining whether there has [292] been any abuse of the exclusive rights under a patent, it shall be taken that patents for new inventions are granted not only to encourage invention but to secure that new inventions shall be, so far as possible, be worked on a commercial scale in Canada without undue delay.

"From the foregoing you will see that licensing of

imported products which hinder working of patented inventions in Canada on a commercial scale constitutes abuse of the exclusive rights granted under the patent or patents involved.

"Furthermore, such abuse can exist should be patentee or persons claiming under him fail to take action for infringement against an importer into Canada of a patented invention.

"At this point it seems fairly evident that importation of Motorola products incorporating our inventions would hinder the Canadian manufacture on a [293] commercial scale of similar products; accordingly, in order to comply with the intent of the Canadian Patent Act, we would not be prepared to license such imported products with the exception of patents of Canadian General Electric Company Limited, and Canadian Westinghouse Company. These we have been instructed to license irrespective of the country of origin of the patented product. Accordingly, should importation of Motorola products take place, and should these be found to incorporate inventions covered by patents which we are empowered to license other than those of Canadian Westinghouse or C. G. E., we would be forced to place the matter in the hands of our solicitors with instructions to take whatever action they may deem necessary in order to protect our patents. I might point out that we initiated two cases in the Exchequer Court last year, one against a [294] Canadian manufacturer, which was settled before coming to trial, and a second against an importer of German radio receivers. Judgment on the latter case was handed down on May 2 of this year in favor of Canadian Radio Patents Limited.

"In closing, I wish to inform you that we would be

most happy to issue a license to you to make or have made in Canada any equipment coming within the ambit of our patents.

"B. McConnell, President."

That came from our distributors, circularized apparently in the trade and that is where we got it.

[295] Of course, they would and still are—Mr. McConnell said we couldn't have a license, we couldn't have a license unless we manufactured—that is the same as saying we can't have any license.

Now, I am not going to labor the point that that is bound to injure a business.

We get to England, they met year by year to agree not to license.

And we get down to Australia and we had this little flurry about License No. 7, which turns out to be not what counsel says it is at all, but the carrying on of this scheme to cut and prohibit competition from a competitor equipped to compete. Nobody can argue that Zenith is not equipped to compete with any of these companies, and it must be obvious to the court that a scheme and device and a means set up under the fraudulent claim of the Patent Act in Canada, which is shown to be a complete false statement in the court here, nobody can claim that that does not violate our antitrust laws and damage the competitor equipped to compete who cannot compete because of it, maintained by our competitor.

Now, we argued this whole thing backwards and for-

[296] wards. There is a great deal more evidence. The evidence is replete of what was done in England, what was done in Canada along these lines. We have to assume the men that were prominent in the industry, who control the biggest companies in the world in the industry knew what they were doing when they were sitting down to stop im-

ports. They weren't going through a lot of idle motions. A company like Zenith could not afford to have its products confiscated, its distributors and dealers sued, and their trade was stopped, as we have direct testimony on it.

Now, I not only put Mr. Wright on the stand on that. I put Mr. Wright on the stand—and let me say by way of interpolation that if I had not put Mr. Wright on the stand, counsel here would be saying, "Why didn't Mr. McConnell put the president of the company on the stand who knows what the company is doing? Why put some little fellow on?" I have heard that so many times. You put the little fellow—

The Court: You have done it yourself and so have I.

Mr. McConnell: I offered Mr. Kaplan as a witness and Mr. Dodds didn't want him. I am reading from [297] 809 of the transcript:

> "Mr. Dodds: Your Honor, I object to this line of testimony. It is duplicative of what Mr. Wright testified in addition to this bulk exhibit of some 75 letters of correspondence indicating their problems."

That was showing where the dealers were riding us and saying that they can't do this, they can't get their products sold in the face of the pool.

He says:

> "I am perfectely willing to stipulate that Zenith has had problems in exporting their radio and television receivers to Canada."

We didn't make any television receivers until the latter part of '58 and '59.

The Court: You mean '48 or '49.

Mr. McConnell: '48 or '49.

The Court: You said '58.

Mr. McConnell: I am sorry.

I have labored on this with your Honor, probably unnecessarily. The court has heard the case, saw the [298] witnesses, could test the credibility of the witnesses.

The courts of appeal say determination of the value of testimony is a matter for the trial court, peculiarly within the province of the trial court; who was telling the truth, who was falsifying in this case has been determined by your Honor.

[299] Now, I am going to leave technical questions of this case to the overall situation. We have heard about the equities in this case and we have heard a plea of sympathy, or a plea of some kind, that the judgment should not be entered against this particular defendant, that Zenith is a large company and attempting to strangle this little person.

Well, now, your Honor is not expected to come on the bench bereft of all knowledge of human affairs. Zenith is a company, as your Honor must know, that started out as a little ham operator station out here on the near north side, and through the years, under the leadership of Commander MacDonald, and later years with Mr. Wright and Mr. Kaplan, has achieved a first position in an industry which is highly competitive, and they have done it, obviously, by producing a fine product which they have always sold in competition.

The record will be searched in vain for any whisper or suspicion that Zenith has achieved its standing by any predatory methods. It has achieved it by the finest ethical standards and ideals of American industry, and it is [300] where it is because it ought to be there. Our opponent has been in every pool which we have been able to uncover all over the world. They may have some government business, but by and large, their business is in licensing through pools, because they can get more money that way, and those pools are shown by this record to be illegal.

The only conclusion I can draw from this record, or that anyone can draw from this record, is that the business of the Hazeltine Company is primarily violation of the antitrust laws, and they have been engaged in it for many, many years, and they have told your Honor, almost as a dare, that they are going to continue it.

Now, the only reason I advert to this is because the strange and novel doctrine has been advanced in this court and in the brief that if a company acheives success honestly, lawfully, that it cannot recover damages from somebody that is smaller or, in the converse of that, that if it can be shown that the net worth of a defendant is less than the record shows, why, then no judgment can be entered against that.

Now, I have heard some ridiculous propositions in [301] my life, but I think that one steps right to the head of the class.

One more point and then I am through.

[302] The Court: Well, as I understand this treble damage thing, it is for the purpose of helping enforce the law and be a warning. I wonder if they had in mind the total destruction of a company by the size of the triple damage verdict.

Mr. McConnell: Well, there is no evidence that anybody is going to be totally destroyed in this case, far from it. What it will do, is will stop them in their illegal activities here.

The Court: I mean, if it puts them out of business, it will stop them. There is no question about that.

Mr. McConnell: Well, if it puts them out of business, but it isn't going to put them out of business, all it is doing is recompensing somebody that they have damaged throughout this time.

Now, the theory of treble damage is to enforce the rights

of the public, and it is written into the law by the Congress. There is nothing discretionary about that.

The Court: I understand that.

Mr. McConnell: Which leads me to my final point; we are dealing here not only with the rights of individual [303] litigants, we are dealing here with large and important public interest; they go back into antiquity, these interests, the right to move one's products in the course of trade. Our law comes from English common law. If you go back to the year books you will find the law of the King's highway where anybody who interfered with trade on that highway became an outlaw and anybody could kill them, anybody could deal with them without trial or other way because there was such a large, important public interest in keeping these highways free from highwaymen or restraints or anything else of the kind.

Here we have this defendant sitting at the crossroads of trade all over the world with the largest companies in the world stopping that trade in which this country, in which our industry has a very, very large public interest. In the determination of this case, this Court has enforced and given new life to that principle so that not only by this judgment had the rights of Zenith been recog- [304] nized and handled in accordance with the law, but large public interests have been vindicated as well.

This company can pay the judgment, but it is not encumbent upon me to show to your Honor that a judgment we obtained here can be collected. This company is continuously violating these laws which we have sought to have vindicated here.

Now, counsel on the other side have worked assiduously and with some staff, I imagine, trying to dredge up and find anything, anything at all that could be utilized to upset this result and the findings and conclusions of your Honor. They have blamed it on poor old Dodds and everybody is

a scapegoat, and it apparently never has occurred to them that irrespective of the merits of counsel or whether they presented their case well or poorly or whether the defendant counter-claimants case was presented well or poorly, or how it was presented, that this Court might have reached a just and correct result. I submit that your Honor has done that. I submit that in spite of the cant and [305] cavil of my opponents, this case can be affirmed and will be affirmed on appeal.

[306] Now, your Honor remarked that there must be an end of litigation somewhere. Nobody but a company like Zenith could even afford a litigation like this and counsel wants to keep it going on and on and on, and something new presented here, there, hither and yon. He comes in here with a Western Union telegram—now, the mountain has labored and labored and brought forth a mouse.

He said we couldn't import into England and he gets this telegram which he waves around here in court, and he says, "From the 8th of June, 1959, specific import license for the domestic radio receivers and gramaphones were no longer required." I think that is about four, five days of the damage period that would be cut off. And we have evidence that we were exporting some radios to England prior to that time in this record. I don't understand this case—this is from McDermott, Will & Emery. They have been in the case all the time. Now, there is a last-minute movement to dredge up something, anything.

I submit that your Honor has reached a correct and just conclusion of this case and that these motions [307] should be denied and that the judgment we have tendered should be entered.

Thank you very, very much.

The Court: Mr. Kayser?

Mr. Kayser: I think, your Honor, it might be helpful to get back to the motions that we filed, not the matters

we did not raise. I think it should be pointed out, your Honor, that the only thing, the subject matter, clearly, of the motion we filed in relation to the antitrust counterclaim was the question of the claim for damage. The question of the claim for damage for treble damage, the question of whether Zenith was entitled to receive and had established the fact that it had been damaged in the amount of sixteen million dollars plus during the four-year period from May 22, 1959, to May 22, 1963, and that is all that is there involved.

Now, we talk about outlaws in the forest whom anyone can kill. That, incidentally, was a rather interesting comment. I wonder what possibly that implies. We talk about the great interest of the public in stopping the claimed conspiracies.

Your Honor, we can recognize that unlawful con- [308] spiracies should be stopped, but the question we have here, and solely the question, is this right of Zenith to recover damages for this four-year period.

Now, contrary to what Mr. McConnell has said, we have not in this motion put in issue the question of the legality of any of these pools except—and I will come to this point again—we have pointed out that in the case of Australia there is no restriction on imports, and I think that Mr. McConnell and I have a very sharp difference of opinion as to what the record shows.

Now, another thing, your Honor, that we are not trying here is the question whether or not there was a conspiracy back in the 1950's which was involved in the Zenith-RCA litigation. We are not trying the question of whether or not that conspiracy continued or these pools continued as unlawful pools, if they were, in the 1950's on. We are not trying the question of whether these pools still exist. We are trying solely the question of whether Zenith has been damaged and has shown such damage during the four

years and whether the amount which is claimed here has been shown as damage.

[309] Now, your Honor, that is what is before this court and that is the subject matter of the motions, and I want to go back to that now. I would like to bring these motions —this discussion back to what we have raised, not what we didn't raise or what we might have raised, what we might raise on appeal if there is one, and so on. I want to talk about what we presented to this court.

Now, the first subject I want to talk about, and this is a very grave one so far as this lawsuit is concerned, and so for as the questions of liability and extent of damage is concerned, is this matter of these governmental regulations, embargoes, if you will, in England and in Australia.

This, your Honor, is one of the most important features of this case, and I submit that this is not a matter which can be sloughed aside by the type of comment which Mr. McConnell—his testimony on the subject I characterize it because that's what he was doing—he gave us yesterday.

What did he say?

He says, on page 262:

> "They talk about tariffs, they talk about restric-[310]tions, they talk about all that. That wasn't so, as he stated this morning.
>
> "I took that evidence over there. I know what the evidence was. You could get imports into England even during currency restrictions, by government permit. You had to apply, but that doesn't mean it was an embargo. There was never an embargo—never.
>
> "And the same thing is true down in Australia. You have to apply for a permit, or did up to a certain time. But that doesn't mean that imports are precluded."

Well, your Honor, factually there are, of course, two different—two difficulties as concerns Mr. McConnell's

testimony not under oath, and one is that he is flying in direct conflict with what his president testified in this case when he said that they had determined—and this is at page 1065 or 1066 of the record. This was the question and the answer:

> "Now, do you recall that prior to the settlement talks, the deposition had revealed that during the [311] damage period which we were talking about"—

This is the Zenith-RCA case—

> "because of currency restrictions, no radio or television sets could be imported into England or Australia regardless of the Pool?
>
> "A. There was a period of time in there where there were import regulations based on currency in foreign exchange."

Mr. McConnell leads him through the fact that in their settlement findings they struck claims for those two countries because of these restrictions.

Now, Mr. McConnell this morning now ridicules the fact that we have a telegram, a mere telegram from the Board of Trade of London of the English Government, which says that until June 8, 1959, there could be no imports of radio or television without special permit, and this other document headed, "United Kingdom Embargo," this same gentleman from the Board of Trade has stated that no special permits were issued in commercial quantities, which is what we are talking about here. And then we have this letter from—this note on the phone conference [312] from Australia in which the Australian Board of Trade has said that until February, 1960, there could be no imports except under the limited conditions involved there which Zenith does not come under.

[313] Now, Mr. McConnnell said that what is the meaning of all this. This covers, in the case of England, he says,

three or four days. Actually, it's two weeks, but that's neither here no there—of the damage period. In the case of Australia, this applies to, well, less than a year, but, your Honor, this has major significance on the question of the amount of damage. Putting aside everything else, putting aside the question of fact of damage, putting aside the question of affirmative defenses, putting everything else aside, if it is true as this evidence indicates that Zenith could not have started in England until June, 1959, could not have started in Australia until February, 1960, then it is also obvious that in attempting to measure the extent of the damage which they say they suffered during the four year period, they would have to figure zero as their starting percentage of the market.

They could not do as they have done in this damage proof. They could not, for the four years, claim damage in England for television sets, for example, on the basis [314] of starting point of 4 per cent of the market on television, and a little over 3 per cent of the market on radio. They would have to start from the zero point, not 4 per cent. From zero.

And the same thing is true in Australia. They would have to start from zero because regardless of any claims of the pools, the government would have kept them out and did keep them out if they were even interested, which they were not. So that their starting point on damage could not be up here going across. It would have to be—to start as the zero point and build up, as it built up in Canada.

Now, your Honor, this is of tremendous significance in this case. Because of the $16,238,872 damage which Zenith claims, $9,941,481 represents England and Australia. It represents a computation based on the assumption of this fully matured market. It is based on the assumption of 4 per cent on radio and 3 per cent on television, and 1 per cent plus and 2 per cent plus in Australia. And on the basis of

this information having to do with the governmental re-
[315] strictions, I submit it is quite obvious that every-
thing else aside, that information indicates that this al-
most ten million dollar claim here for these two countries
is very largely unfounded, on that fact alone.

Then your Honor, when you realize you are talking about trebling that, you are talking here about something in the minimum nature of fifteen million dollars which, under any theory, must be improper if, as we believe to be the case, these governmental regulations did apply. So that in any event, if Zenith was interested in those two countries, they had to start from scratch. They would have had to start from scratch in England on June 8, 1959; they would have had to start from scratch in Australia in February of 1960. And, your Honor, this is something which is before this Court, before judgment is to be entered.

[316] We submit that this is in fact the nature of new evidence. But even if it were not, this is a kind of measured thing which, under the cases which are in our memorandum, are considered to be a compelling reason why a case should be reopened. Now, that, your Honor, is my first point.

Secondly, I am very curious as to why Mr. McConnell found it necessary yesterday to bring in the Westmoreland case having to do with the effect of releases, and having to do with the limitations which public policy places on releases. He spent some pages of the record yesterday pointing out to this Court that the whole question of the release in the Zenith-RCA case, which we seek to plead here, is totally irrelevant because, he says—and certainly, as I shall point out, I not only do not deny it, I point it out myself—he points out the case of Westmoreland Asbestos at page 245 of the record, where the Court said that you could not give a release for damages based on future acts in violation of the antitrust laws. You cannot now say

[317] that if I violate the antitrust laws in the future, I am to be released from those acts. We have no question, no quarrel on that whatsoever.

Then he finally says at page 248, he says,

> "All right. So I say there is nothing to the release point."

Well, now, your Honor, what does that have to do with the release which we referred to? What does that have to do with this lawsuit? I pointed out to your Honor in connection with that very matter—I pointed out that the reason we were offering to prove those releases was because it released—or they released the future after effects of acts occurring on or before the date of the release. We pointed out that one of those future after effects which Zenith is now trying to claim here is the fact that those acts are supposed to have interfered with his ability to create this—develop a market from which it could profit during the four year period involved.

And I said this, and I guess Mr. McConnell was here, but I guess—well, he doesn't like to listen to me; I got [318] that impression anyhow. He says:

> "We are not saying, your Honor, not suggesting for a minute that this is any release of any liability on account of any acts in the future."

Your Honor said:

> "Oh, I see."

And then I went on:

> "As a matter of fact, there are cases, and I am sure Mr. McConnell would mention them if I didn't—there are cases which say that if you try to release the effect of a future violation, that is against public policy."

Now, I continue:

> "We are not contending that for this release at all."

And then I went on to say that what we were contending for was the after effect, that there was a release of the after effects of the alleged acts of the alleged conspirators on or before September 27, '57. And I said that since Mr. McConnell claims that we are co-conspirators, [319] we as alleged joint tort-feasors have the benefit of that release.

And yesterday, in answer to a direct question from your Honor, he had to admit that that was the case. So when he says that the release has no relevancy at all because he says it involves an illegal contention, your Honor, he is not speaking the fact. I made no contention of the kind that he sought to deny. I made an entirely different contention, one that is entirely proper. And that release, your Honor, ought to be in this case, and it would have been pleaded if the original counter-claim had been so framed as to make it appropriate.

[320] Now, your Honor, I would like to, since Mr. McConnell has regaled us a great deal with the Zenith-RCA case, and how he brought the great lawyers of New York to their knees—I have no comment on that, but I do have a comment on another case which I think is very instructive. Mr. McConnell took great offense at the idea that we would suggest here that he would actually plead one theory of action and try another. I believe he said he took umbrage at it or something like that.

Well, when we make that suggestion, and we make it not because there is a precedent, we make it because it is the fact—but when we make that suggestion, your Honor, we are not the first one to have made it. Because in the case of Wisconsin Liquor Company versus Park and Tilford Distillers Corporation, the Seventh Circuit accused him of the very same thing.

Now, that also was a treble damage action with some other counts in it, and Mr .Thomas E. McConnell, Mr. Phillip J. Curtis, and Mr. Francis J. McConnell appeared for

the appellant plaintiff. And the [321] first count in that case was a treble damage action, also alleging that Park and Tillford and some others had entered into an illegal conspiracy to monopolize, and damaged Mr. McConnell's client.

Then shortly before trial, he asked leave to file a so-called supplemental complaint, alleging a different conspiracy involving Schenley Industries in a different theory of action, and the defendants objected on the ground that they woud be prejudiced in preparation of their case for trial.

Leave was denied. But, your Honor, that didn't take care of the situation, and I now read from the opinion written by Mr. Justice Hastings. He says:

> "In presenting its case, appellant departed completely from its original allegations charging a conspiracy on the part of Affiliated and Park and Tillford to sell to Bonded Spirits at discriminatory prices and to grant it rebates and discounts and allowances; and [322] instead sought to establish the existence of a conspiracy of which Schenley was allegedly the guiding light," and so on.

And then at the end of the plaintiff's case, Mr. McConnell again, or his office, again sought leave to amend its compliant. This was the second trial—try, rather, to conform the pleading to the evidence, and it was denied.

And the District Court in the Seventh Circuit held that he was limited to the question of whether he had proved the cause of action as pleaded, and held that he had not.

Now, while we are on this case, I think I will sidetrack for a minute to read another brief portion which I believe is appropriate on this question of fact of damage, this damage issue. It is also appropriate because, here again, we have Zenith's counsel. It says:

"The only other evidence on the question of damages was testimony by one of the appellant's officers that during the twelve month period its books showed [323] gross sales of Park and Tillford products amounting to so many dollars. This witness testified that absent interference arising from the breach of contract, appellant would have doubled such sales and profits. This testimony has no support in the record since there is no competent evidence of loss of customers or sales, and could certainly be no basis for the assessment of damages. Loss of profits is a proper measure of damages in Wisconsin, but the evidence must furnish some basis on which profits may be computed with reasonable certainty. Recovery of alleged loss of profits cannot be had on the basis of pure guess work and speculative evidence as to the existence and extent of such losses."

[324] Now, your Honor, I suggest that this language has particularly particular appropriateness as concerns England and as concerns Australia, but also as concerns Canada where we have the statement of the two executives as to what their sales would have been, their loss of profits would have been, and so forth. But although Mr. McConnell promised in his opening statement of this trial to furnish evidence of loss of customers and so forth, he actually didn't furnish one single bit during the four-year damage period.

It is also interesting to note in the Kobe v. Dempsey case, which he read from at great length, that there the court also recited at great length as to all of the concrete evidence that had been put in in that case which justified a finding that there was some damage.

Next, your Honor, I want to switch very briefly to a subject that I think we have talked about at some length

before, and I don't want to belabor it. But I think it might be helpful if I added a couple of additional comments. And this is on the question of whether or not there was notice of the cause of action embodied in [325] the findings.

Now, as I said before, and I think this is a distinction that we must remember, that we are talking here only as to the issue of damages, not as to whether or not there was any allegation of a conspiracy; because the fact of the matter is, of course, there was in this case also a prayer for an injunction, and we haven't raised that point on our motion. We are talking only on the issue of damage and, as I think I said yesterday, that the damage claim obviously is limited as we have described in our chart, and it must be so limited because, if it were not, then Mr. Crotty's affidavit and the motion which counsel filed would not be truthful. But we believe that paragraph 9 of their counterclaim and those affidavits and motions clearly did state and limit the theory as to causal acts, as to period of time, and as to scope of alleged injury.

Now, your Honor has suggested that be that as it may—and whether he agreed up to that point or not I guess only time will tell—be that as it may, certainly there was notice given in the pretrial brief. Mr. McConnell did read [326] yesterday an excerpt from the brief which I don't know whether your Honor realizes it or not, but it was in a footnote at page 46; it wasn't in the text.

Then I would also like to volunteer to Mr. McConnell and advise the court that if you read the brief carefully, he did run in another reference at page 32 which referred to a four-year period. And if somebody was reading this pretrial memo very suspiciously expecting this kind of tactic, that that might have been a tip-off that maybe there was a change. But everything else in that memorandum is perfectly consistent with the counterclaim as pleaded.

And as a matter of fact, if you look at page 27 to 28, you see a reference obviously to damage for domestic conduct; namely, these two acts of pendency and threat; and then you see a reference to injunction in relation to the alleged international conspiracy.

So there, really—unless you look at it from the Monday morning point of view, that pretrial memorandum certainly was no tip-off. And I must tell your Honor I read it a number of times. I read it again last night. In so far as that pretrial memo justifying the switch is concerned, those two features looked at afterwards were the only possible indications.

[327] And, also, Mr. McConnell read yesterday from page 18 of the record, his opening statement, in which he referred to an English pool. The fact of the matter is, if you read the rest of his opening statement, including page 31, and much of the material between 34 and 40, you see again that what he was talking about in relation to damage was perfectly consistent with his original theory. But, your Honor, supposing I'm wrong all along the line on that. Where does that leave the subject matter? The fact is that the pretrial memorandum, or the pretrial brief of Zenith was not served until February 11, 1964, or some six days, including the weekend, before the opening of trial. It was served obviously in the last minute pretrial flurry of getting ready. And then, of course, the opening statement was at the very beginning of the trial.

So whether or not, your Honor, this be considered notice of a kind, I think we have a very serious question. Is this the kind of notice which is adequate as a matter of due process to enable a defendant to consider whether or not the theory gives him a chance, or rather raises [328] the possibility of new defenses? Would this be the kind of notice which Mr. Dodds should have to consider, whether

or not there was a matter of a release, or a matter of a statute of limitations?

And one step further, your Honor, at best this information did not indicate in any way that Zenith proposed to do as it in fact did on acts which occurred prior to the four year period. It did not notify them. It could not notify them that Zenith intended to rely as in fact it did on acts occurring prior to and which would be barred by the releases.

So even if he had a kind of notice, it is not the kind of notice, particularly in the last minutes before trial, which would give him the chance to do what he would normally do if he had had a pleading put before him in the normal time to consider and to answer.

Now, Mr. McConnell yesterday volunteered not only that he didn't like Mr. Dodds, but that his affidavit was a falsification. Now, I submit that regardless of the theory which Mr. McConnell says Mr. Dodds used in defending [329] against the counter-claim, it must be quite obvious that if Mr. Dodds had realized exactly what it is that Mr. McConnell proposed to prove and rely on, he certainly would have pleaded the statute of limitations, and he most certainly would have pleaded the releases. Because Mr. Dodds himself—he didn't have the releases, but the documents which Mr. Dodds put in, particularly Plaintiff's Exhibit 48, I think it was, was the settlement agreement between counsel in the Zenith-RCA case which specifically said that releases would be given.

Now, if Mr. Dodds had not been surprised, had not been unaware of what was happening to him, I suggest that these defenses would have appeared and I suggest that Hazeltine should now be allowed to raise them for the reason, among others, that Mr. Dodds did not have an adequate notice of what Zenith's final cause of action was to be.

And I will get, a little later, to this question of the notion that the statute of limitations—that the right to [330] plead it has been waived.

The Court: Maybe we will take our morning recess now.

(Whereupon, a short recess was taken, after which the following further proceedings were had herein:)

The Court: You may proceed.

Mr. Kayser: Your Honor, we come now to this subject of statute of limitations on which Mr. McConnell dwelled at quite some length yesterday. And again we were told about the conspiracy back in the '50's, and that it had continued, and then Mr. McConnell did what I think is a quite curious thing. He quoted to your Honor from U. S. vs. Kissel and U. S. vs. Hyde, both of which were criminal cases involving the United States. They were not treble damage cases.

[331] Then he made the comment—if you will pardon me, I don't have á ready reference here—he made the comment to the effect, he says there isn't a case in the books, not one, which holds that a continuing conspiracy can be barred or sanctified or made legal by a statute of limitations. Well, that is very interesting, and that is very true, but it doesn't have a blessed thing to do with this lawsuit.

Now, it is true, of course, that there are these cases which he refers to, which say that if you are in a conspiracy, you have the burden to show that you got out. And it is also clearly true that there is no statute of limitations which, at least in the same context as in the treble damage cases, which bars prosecution criminally or as concerns an injunction by reason of statute of limitations. There is an entirely different rule of conspiracy, an overt act, and so forth, but it doesn't have a thing to do with the question of an action for treble damages. It doesn't have a thing

to do with a question of statute of limitations in connection with an action for damages.

Now, I would like, your Honor, to try to set the [332] record straight once and for all on this.

Your Honor, excuse me. I am having some trouble finding the material I wish to use.

The Court: Take your time, take you time. Don't be concerned.

Mr. Kayser: I am sorry. I have it here—to read from the Seventh Circuit case of Baldwin v. Loew's, Incorporated, which was decided in this circuit January 16, 1963, which is 312 F. 2d 387. And I shall read from page 390.

Now, Mr. McConnell doesn't say so expressly when you read the record very carefully, which it is obvious he is trying to create the impression that there is no such thing as a statute of limitations in a continuing conspiracy involving a treble damage action; that there is no statute of limitations where treble damage claims are concerned.

The Court: You do agree that the statute of limitations can be waived. You agree to that, don't you?

Mr. Kayser: Yes, but I shall come to that in a moment, sir.

What does the Seventh Circuit say?

[333] "Where one has been injured by a civil conspiracy a statute of limitations begins to run at the time that injury is inflicted."

And then—this case here involved a lease. I won't read that portion.

Then it goes on, citing from the Steiner case in 232 F. 2d at 195:

> "In a continuing conspiracy causing continuing damage without further overt acts, the statute of limitations runs, as we have noted, from the time the blow which caused the damage was struck. Any

> further internal injury affects the problem of how much should be claimed in damages, not the problem of when the statute of limitations commences to run."

Then, going on:

> "In Momand v. Universal Film Exchanges, First Circuit, 172 F. 2d 37, at 49, the court held that the rule of criminal antitrust actions that a statute of limitations does not begin to run until the last overt [334] act performed in compliance with the original conspiracy has been accomplished does not apply to a civil action."

So, again, your Honor, we have been treated to some lessons in law here, but not to lessons in law which relate to the subject matter which is before this court.

[335] We do not claim that the statute of limitations is a method of sanctifying an unlawful act. Nothing of the kind. We claim merely that the statute of limitations operates to bar the damage action, except to the extent that acts—that the damage results from acts which occurred within the four-year period. And we contend that no such acts are shown.

We further say, of course, that even if aggressive acts are shown, there still is no cause of action for damages unless it can be shown that damage did in fact occur. It is like that automobile case we were talking about yesterday where the cars collide, but the second car cannot show that he as much as got his paint scratched.

Now, what Mr. McConnell is really trying to sell this court is the idea that if he can show that these pools continued after 1957 and, as he defines the pools, yes, yes, they did. There is no question about it, that these arrangements in relation to patents—that characterized necessarily as he characterizes them, but that these arrangements have

continued and, so far as I know, are in existence today. [336] There is no question about that.

The question is, was Zenith hurt within the four-year period, and was damage suffered within the four-year period. And we say, your Honor, that on this record this is not shown.

Now, he cited a couple of more cases on damage and demand and so forth. One of the cases, the Congress Hotel —or the Congress case that he cited, actually doesn't stand for what he says it does, because there the question of demand was whether or not the landlord should make the demand. It wasn't a question of demand by the tenant who was operating the theatre and would get the picture or not get the picture. It was the question of demand by the landlord whose rent was affected, but who obviously not being in the movie business was in no position to make a demand. Enough for that.

Now, I would like to digress just a minute when we are talking about damage, to one subject matter that Mr. McConnell—although he talked a great deal about Canada, one subject which he completely ignored was the question of Zenith's annual reports and what they showed and don't show. And I can understand why he chooses to ignore [337] them because, as we pointed out, they did show that after the settlement, Zenith went expeditiously into Canada, and it did do well until the Canadian tariff hit them. And these reports also showed that despite the fact that Zenith reported extremely in great detail to all of its shareholders about all the problems they were having, including previous problems from so-called cartels, including tariffs, exports, foreign competition, Japanese low prices, and so forth, that there was quite strangely not one word mixed in with the glowing talk about what they were doing in Canada. Their report to their shareholders was very, very glowing and optimistic until the tariff hit. And

there wasn't one word in there which indicated that they were being impeded in any way.

Now, of course, Mr. McConnell did say that allegedly but for the pools they would have done a great deal better, but I suggest that it is a flight from reality to assume or to say that but for the pools, they would have had between late '58 and June, '59 the same share of the Canadian market as they had achieved in this country in ten years in television, and thirty-five years in radio.

[338] That again is dealing in "maybe so's" and abstractions but, your Honor, it is a complete divorcement from facts, which is what we must consider here, and the best evidence of what happened in Canada is what was said and what was not said in their annual reports.

Now, you Honor asked this question of statute of limitations and was there a waiver.

Now, on that, as I think I have said a number of times, that one of the most serious consequences which have resulted from the failure to plead the cause of action which was proved had to do with these affirmative defenses of release and limitations, and Mr. McConnell has suggested that, "Well, that is tough. Al Capone raised it and he couldn't get anywhere with it and we can't either," and then he brought in another Fawcett Publications case this morning.

But I suggest that there is a case in this circuit, and a treble damage antitrust case, which contradicts Mr. McConnell, and that is the Emich Motors case, Emich Motors Corporation v. General Motors Corp., Seventh Circuit, January 27, 1956, which is 229 F. 2d 714.

[339] In that case, your Honor—this is a treble damage action involving the question of a continuing conspiracy—the statute of limitations was not pleaded at the trial and plaintiff got a judgment of something over $1,200,000.

The case went up on appeal and finally the Supreme

Court of the United States, based on some errors, sent it back for a new trial.

Now, at that time General Motors, for the first time, wanted to interpose the statute of limitations and the plaintiff counsel said exactly what Zenith's counsel says here, "Well, that is tough. You can't do it. You have waived it."

Well, now, what were the facts in that case?

The facts were that the statute in question, which they then pleaded before the federal statute was amended, was a two-year Illinois statute of limitations. That was the statute that was involved, and at the time of the original pleading there was no authority as to whether or not the statute applied, and there were a couple of hints that maybe it didn't.

Accordingly, General Motors did not plead the [340] statute at that time and then later, in the interim, the Supreme Court came down with a decision which indicated that it did apply; so that at that point General Motors sought to plead the statute. And they were allowed to do so. They were allowed to do so because of the particular circumstances that were involved, and the Seventh Circuit, in holding that this was proper, said:

> "It is well settled that a defendant who desires to avail himself of a statute of limitations as a defense must raise the question either in the pleading or on the trial or before judgment."

Now, I am not suggesting, I am not even—I don't think it is relevant as to whether or not a defendant normally has a right to wait to interpose the statute of limitations, but I do suggest with just as much force as I possibly can that this is a case where the right to interpose the statute of limitations should be recognized. The counterclaim as pleaded would have made the interposition of the statute of limitations at that time, the release at that time,

it would have been ridiculous, because the alleged [341] acts causing damage and the alleged period of damage all was less than—both was less than four years. As a matter of fact, it was about two years. There would have been no reason on God's green earth to impose either, and certainly, if it be assumed that the pretrial brief or the opening statement or something of that type should have tipped off Mr. Dodds and should have sent him to the books and should have sent him investigating the release, certainly he did not have an adequate opportunity, and that opportunity which would have amounted to due process to investigate and interpose those defenses.

[342] And I say, your Honor, that we are clearly within the rule, the permission laid down by Emick case as clearly as any defendant or counter-defendant could possibly be.

Now, I would like to come to another point which Mr. McConnell raised, and that is the matter of this license form No. 7 in Australia, where I gather I am being accused of less than complete frankness. Mr. McConnell discussed this subject at, I believe beginning page 248 of the record. He pulled out a copy of license No. 7 as to which we made an offer of proof to show that the prohibition against imports and exports under the patents were not in license No. 7 as it was not in license No. 6. He pulled that out, and what did he read to the Court? He read to the Court from paragraph 4b of license form No. 7, which has to do with the patent marking which has to be put on the set which says that the instrument, the radio or television set was manufactured under a license granted by Australian Radio Technical Services and Patent Company, et cetera. [343] There he says that proves that Hazeltine's counsel is lying to the Court, that there in fact is a restriction, that in fact you must manufacture in Australia.

Well, now, your Honor, this is nothing more than a routine marking to show that your device is covered by—

is licensed under the patents. This instrument was manufactured under a license that could read—and Mr. McConnell will make big significance of this—this could read, "Was sold under a license or was manufactured for sale under a license or is used under a license." But I submit that for Mr. McConnell to attempt to draw a conclusion and to attempt to collect two million dollars on the basis of that one word is going pretty far, and I shall tell your Honor why it is going pretty far.

Now, as we explained, the whole number licenses are the ones Zenith could get and the B licenses, 7B, 6B, and so forth, were the licenses which according to this record are given to local assemblers. Now, what was it, your [344] Honor—and don't forget that Mr. McConnell had all this material, or earlier editions when he made his findings here or proposed them. Your Honor, I am getting inundated in my own papers here.

The Court: That has happened before me before and it has happened to me before.

Mr. Kayser: What was it that Mr. McConnell complained of and what was it that he characterizes may be illegal restrictive operation of the Australian pool which gave him his claim for two million dollars damages? He says that the Australian pool—that for over thirty-five years they have had a form of license agreement, the only form issued by the pool, a standard package license agreement not referring to any particular patent or invention, but to all of the rights of all of the conspiring parties. And then he says that a standard pool license imposes the restrictions necessary to effectuate the division of territories involved in the overall arrangements. Then he goes on, and this is the significant part, he says:

[345] "It requires the licensee to agree not to export or import or sell or offer for sale in Australia any

radio or television receiving apparatus not manufactured in Australia."

[346] Now, your Honor, where did he get that language? Where did he get it? Did he get it out of this paragraph which he comes up and reads to your Honor yesterday as being a restrictive provision? That same provision was in License No. 6 which was in this case. Is that where he got that language? Your Honor, it is not. That language is a direct paraphrase out of License Form 7B, 6B, 5B, and so forth, which the local assemblers license, because paragraph 4A and -B of the 7B license reads:

"The licensee agrees with the grantor as follows; not without the previous written consent of the grantor to sell, to export or sell for export or knowingly permit to be exported any broadcast sound-receiving apparatus or radio gramaphone, not without the previous written consent of the grantor to sell or hire or offer or expose for sale or hire in the territory for which this license is granted any broadcast sound-receiving apparatus or television receiving apparatus or radio [341] gramaphones which have not been manufactured in the territory which this license is granted."

There, your Honor, is the prohibition which he refers to against exporting or importing, and that is what he relied on in his findings, and that is in 7B and 6B, and so forth.

Now, as concerns this marking paragraph he referred to, and is this an obscure way of saying something. Well, the fact of the matter is, your Honor, that up in the early license agreements prior to 1951 this same 4A and -B, which I have just been reading out of the 7 Form, that was in the whole number forms. That was there expressly and clearly and the obvious purpose of striking it was to strike it. If they still wanted the provision, they would have left it

there as they left it in 7B, but they struck it and it is no longer there.

[348] And further, your Honor, in view of the fact that we have almost two million dollars liability claimed in Australia, the idea that because counsel here wants to construe one word to have an ulterior meaning when the record itself, the intention of the parties is clear, your Honor, I say again that this is a flight from reality. It's one thing to concoct a legal theory as one lawyer to another, possibly, but it is another thing to try to collect two million dollars on a construction of a word, particularly when that construction is in conflict with the rest of the record.

Now, the next subject I want to come to is the matter of Exhibit 218.

Mr. McConnell did a great deal of what I would call peripheral defense of it and took me to task because I didn't like its form. And if I was unduly critical about the penmanship or so forth, I apologize, but I refer to that only as being indicative of the circumstances under which it was prepared. But what did Mr. McConnell say about the contents of the exhibit itself? The only thing that he made any reference to at all, and he ridiculed it, [349] was the reference by Ernst & Ernst to this question of profit-sharing. And he tried to dispose of all of the questions about Exhibit 218 on the basis of that reference.

Well, now, your Honor, if you take a look at the Ernst & Ernst report comment on the profiting-sharing at page 21 of their report, all they say is that some questions occur, some possible inconsistencies, and being sound accountants they attempted no conclusion on that point because, they say, the effect, if any, of this inconsistency on the final claim figures cannot be determined since it is not clear as to whether the Canadian profit and loss figures used in Schedules 10, 10A, 11 and 12 included profit sharing. Being

careful, cautious people as they are, not here to try to twist something, but to attempt to determine the facts, they have raised a question on the profit sharing and they have said that the final determination as to the facts in relation to profit sharing cannot be determined because they do not have sufficient information.

In any event, your Honor, that is all the comment that Mr. McConnell cared to, or I think probably dared to [350] give concerning Exhibit 218, because, your Honor, what did Mr. McConnell have to say about the fact that Exhibit 218 claims nine million dollars loss of profit in England on the basis of Canadian prices rather than English prices, whereas English prices, if used, would have caused them to lose eleven million dollars in four years from that business. What did he have to say? He had to say absolutely nothing, even though this made this indication of a twenty million dollar difference as concerns England alone. In fact, the indication was that there would be an eleven million dollar loss rather than a nine million dollar profit, and even though there is a certain element of uncertainty there, because Zenith says it could get more than the English manufacturer and so forth, but the basic question, the basic flaw, the basic uncertainty, the basic untrustworthiness of this Exhibit 218 is reflected in that one point alone, and Mr. McConnell did not even mention it.

Now, what does he have to say about the question which Ernst & Ernst raised in great detail as to the odd way these hypothetical profits were apparently increased by the [351] treatment of the cost figures of this matter of fixed cost. What did he have to say?

Well, he made—I suppose this is included in his general comment, that an accountant can prove anything with any set of figures.

Well, I think, your Honor, I think after looking at this exhibit that that is possibly a pretty accurate statement.

But this report shows careful consideration by Ernst & Ernst. I venture to say that they spent a great deal longer in analyzing this exhibit than was spent in making it. I venture to say that that is true because there are so many defects and flaws here.

[352] The Court: And perhaps more time than your prior auditor Oscar Anderson and Company spent on it.

Mr. Kayser: Yes, that is right. Of course, he also had a shorter time.

What does Mr. McConnell have to say about the question of Zenith's share of the U. S. market, the failure to include imports in that share? What does he have to say about that again? Nothing. As I say, he tried to dismiss the Exhibit with the minimum of attention. Now, this is a small matter, but he did say, I believe, not entirely accurately, that Mr. Dodds raised no—approved the Exhibit and that it was fine with him.

Now, I recognize that no objection was made at the trial. I recognize, your Honor, that you asked him if he had any objection and he said that he did not. That is clear in the record. But for complete accuracy, so far as saying that Mr. Dodds had approved this, he did say in his post trial brief, he did talk about this Exhibit in an attempt to attack it for several pages and then he said, on the whole, the hypothetical figures of DX 218 and 220, which are [353] part of it, simply are unreliable.

Now, I can certainly agree that this whole matter should have been pursued with a great deal more vigor than it was, but I do think it is fair to point out that he did not, in fact, approve it.

Well, your Honor, I am coming to the conclusion. It is to be expected the Court may have some conclusionary remarks to make.

Now, we have talked a great deal the last two days on this question of surprise and change of theory. I think I

reviewed at some length with your Honor yesterday the question of relative delay and relative culpability. I suggested to your Honor that even though Hazeltine's counsel possibly could have done a somewhat better job, that the delay which it caused was by no means as great as the delay in Zenith in not having pleaded this so-called action back in April of 1960 when it could, and that there was also—that there was greater culpability on the part of Zenith in having slipped in this theory without actually [354] having amended the pleading. And, again, I am talking about the theory, the claim for damage and that alone.

But entirely aside, and casting aside all those things for the moment, we are here, your Honor, before this Court, before judgment has been entered, we are before the Court which has the power to rectify these things which have occurred and which have been done. We are before this Court saying to his Honor that if these things are allowed to stand and regardless of culpability, diligence or what, that if this judgment is entered this is, in fact, as Mr. McConnell has put it, like a death sentence. Now, your Honor, we, of course, appreciate consideration from the Court. We appreciate these are matters of discretion, but we believe, your Honor, that basically the question of whether the judgment can be entered on the face—on the basis of what is before your Honor, we believe this is a matter of legal propriety. We raise the question, can a judgment properly be entered when your Honor is [355] apprised of the existence and the desire of Hazeltine to plead the defense of release of joint tortfeasor which would bar a very substantial portion if not all of this claim? Is it proper for your Honor to enter judgment realizing that we have a wish to plead the matter of the statute of limitations, which we again believe will bar all or substantially all of the claimed recovery. Is this proper for this

Court to enter this judgment realizing that there is this serious question, assuming there is a doubt, that there is still this serious question as to the existence and the effect of these embargoes in England and in Australia which not only discredit the theory under which Zenith hopes to collect all the damage which it seeks here, but in the case of Australia, your Honor, even absolutely bars the damage for almost one year, and bars a small portion in England. But basically can this Court award nine million dollars in England, for example, and treble it realizing that that damage is based on the theory of a developed market when in fact by reason of these legal impedi- [356] ments Zenith would have had to start from scratch in June of 1959.

[357] And can the judgment be entered as concerns Canada, realizing the devastating admissions of stress and by silence in the annual reports in which Zenith presumably speaks freely and frankly and honestly to its shareholders? Can a judgment which is based, which is in direct conflict with that information and those admissions—can that properly be entered and can it stand? And can a judgment stand, your Honor, based as to the amount of damage on this Exhibit 218 which is so full of major flaws and unanswered questions? Is it enough to say that an accountant can make anything out of a set of figures? Isn't it quite apparent that that exhibit is not trustworthy and cannot do the job.

So, we say, your Honor, that the question that we have here is one of propriety and one of law, as well as a question of consideration, we respectfully request of this court —namely, whether in the light of these circumstances, and whether in the light of all the other circumstances that have been brought out in our motions, memoranda, and oral argument, whether this court can properly enter the judg- [358] ment pursuant to these findings and conclusions.

Now, your Honor, if I may, I would for the sake of the record like to make a couple of oral motions.

First, in view of the fact that the question has been raised as to whether or not the cause of action for damages stated in the findings was in fact disclosed and pleaded, I would like to ask leave at this time to file within a short date our affirmative defenses as a formal pleading of release and statute of limitations.

And also, your Honor, I would like again, to complete the record, to move at this time that the counterclaim as pleaded be dismissed for lack of proof, and that the counterclaim as embodied in the findings be dismissed for lack of proof and by reason of the bars of the statute of limitations and the releases.

Thank you, your Honor. I have very much appreciated your courtesy and your vast patience in listening to me. This is a matter of vital importance to the client, and if I have transgressed either on your Honor's time or in any other respect, I am sorry. But I do appreciate very [359] much the consideration that you have given me and the client.

The Court: Mr. McConnell, do you care to address yourself very briefly to those two motions he just made? You will be limited to that.

Mr. Kayser: Sir?

The Court: Mr. McConnell—the ones that have to do with seeking to file these new pleadings on the statute of limitations.

Mr. McConnell: Well, the statute of limitations—this case is clearly distinguishable from the Emich case—

The Court: All he is doing is asking leave to file, and that is the only thing I wish to have you address yourself to.

Mr. McConnell: I think it's too late. He can make it for the record, but to actually file them in this case, the record is made. The case has been closed.

[360] The Court: Well, the record will show that leave is given to file them at this time, after proofs are closed and after findings have been made.

Let me say that as far as the Court is concerned, that this has been perhaps the most gratifying two days that I have spent on the bench since I have been here. It is not often that I have before me men of the stature of those who have argued on behalf of their respective clients for the last two days.

You may say to what you have designated as the first team that had the first team been here, he could have done no better than the second team did. And I think I know enough to appraise that.

The Court at this time is prepared to enter the final judgment and decree offered with the exception of the eight numbered figure in paragraph two. The Court feels that in regard to a very limited degree, that perhaps there should be further proof solely on these two questions—the questions of the damages in regard to Australia and the damages in regard to England.

In regard to Canada, there will be no change as far as the Court is concerned. I feel that counsel [361] should have an opportunity to offer what proof he can adduce in support of the statements made here and the offers of proof made. And it will be limited to this, let me assure you. As to whether or not radios and televisions could have been imported into England and Canada in commercial quantities prior to the start of the damage period. And in the event it is established that they could not, I would think it would require a readjustment into the percentage figure of the market.

We are not going to go into 218 and contest the figures

that were offered at the time of the trial as to their authenticity or their credibility. I can see no need of any further discovery in regard to the limited proof that I will permit. I will not permit CPA's, regardless of what firm they are from, to attack the figures that have been offered other than in regard—and not perhaps even from them—as to whether in the event the cartels or pools themselves were not the proximate cause of imports into Australia and England prior to the time the damage period starts.

There could be some testimony as to whether the percentage of the market claimed under those [362] circumstances, if that is shown to be the fact, whether the percentage figures should be as high as they are. But this is not going to be a field day for accountants going into 218 in regard to the reliability of the figures offered on the profit and loss angle. It can result only perhaps in the diminution of the percentage figure for the four-year period if Zenith was unable to, because of the law of England and Australia involving currency restrictions, to sell and establish a market.

For that reason, as I say, there may be a switch in the numbers in finding 36, the ultimate numbers. None in regard to Canada, and only to the limited extent that I have indicated from the bench today in regard to Australia and England.

Whether Mr. McConnell and his client want a partial judgment and decree in regard to all of the other aspects of the proffered final judgment and decree other than the six figure number contained therein, if he decides in the affirmative I will sign such a partial judgment and decree. But I do feel that in order to satisfy myself, in order to do equity in this matter, that I would like, to the limited extent expressed, a reopening in regard to the matters that I have indicated that do trouble me [363] by virtue of the offers of proof that have been made and the

statements that have been made in regard solely to Australia and England.

And I would suggest that since this involves overseas matters, that we set this hearing for Tuesday, June 1st. That should be ample time to get what is concerned here from the sources from whence it must come.

Yes, Mr. McConnell.

Mr. McConnell: May it please the Court, under the rules of this court, it is possible to enter a judgment on that portion of the case which has been adjudicated and, under those rules, the Court can designate that as subject to appeal.

At this time, I would like to enter a motion that the decree and judgment insofar as it concerns Canada be entered, and that the Court reserve jurisdiction for the issues comprised, as your Honor stated them, in the fixing of damages in England and in Australia.

Now, we have tendered a judgment on the issues, the patent issues—

The Court: I know, I know.

Mr. McConnell: And I think that under the circum-[364] stances of this case, that we should be entitled to that at this time, with all due deference to your Honor.

The Court: I have indicated I would sign them, Mr. McConnell. If you want it done, and if you will submit an amended judgment and decree which embraces the figures from Canada, with the reservation in there in regard to the damages in regard to England and Australia, I will sign that.

Mr. McConnell: I would like to present that tomorrow morning.

Mr. Kayser: Your Honor, if it is to be in the form which he previously submitted, then we would like an opportunity to oppose it because there are aspects to it—

The Court: I mean, what can you say tomorrow that you didn't say the last two days?

Mr. Kayser: We were speaking about the contents and form of the judgment, your Honor. We are speaking about the matter of the injunctive provisions, and also, if the Hazeltine Corporation is to be named as a party to it we then wish to appear especially to oppose it on behalf of Hazeltine Corporation, the parent.

[365] The Court: Wasn't there a stipulation at the outset of this case that Hazeltine Research and Hazeltine Corporation were to be considered as one and the same?

Mr. Kayser: Your Honor, that stipulation does not have the effect which I gather your Honor is giving it here, and that's one of the subjects that—as appearing especially for Hazeltine Corporation, which we would wish to raise.

There are also provisions as concerns injunctive provisions themselves which would need some clarification.

The Court: Mr. McConnell, get this proposed new judgment and decree over to his office as early this afternoon as possible. I will hear you in regard to the entry of the decree at 11:00 o'clock tomorrow morning.

Mr. Kayser: And your Honor, how long may I have to file this affirmative defenses?

The Court: Five days nunc pro tunc as of today.

Mr. Kayser: Thank you.

The Court: All right.

Mr. McDougall: Your Honor, I have to be in Washington tomorrow morning to argue a case before the [366] District Court there.

The Court: Mr. McConnell may be able to get along without you.

Mr. McDougall: I am sure that he can. I didn't want by absence to be taken as a lack of interest in the proceedings, your Honor. Thank you very much.

The Court: All right.

(Whereupon, the hearing in the above-entitled matter was adjourned to 11:00 o'clock a.m. the following day, April 2, 1965.)

Supreme Court of the United States

No. 1117 ---- , *October Term, 19* 69

Zenith Radio Corporation,

Petitioner,

v.

Hazeltine Research, Inc.

ORDER ALLOWING CERTIORARI. Filed March 16 ---------- , 19 70.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh ---------- Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.